Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 77-25

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1976

No.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, FLAGG BROTHERS, INC., and HENRY FLAGG, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which reversed an order of the District Court in their favor dismissing, for lack of "state action", plaintiffs' complaint challenging Sections 7-209 and 7-210 of the New York Uniform Commercial Code as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and which remanded the cause to the District

Court for class-action determination and to determine the constitutionality of Section 7-210(2) authorizing enforcement by extrajudicial sale of a warehouseman's lien upon stored household goods after default in payment of his charges.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is set forth in full in the Appendix beginning at 3a. The opinion of the District Court for the Southern District of New York is reported at 404 F. Supp. 1059 (S.D.N.Y. 1975) and is set forth in full in the Appendix beginning at 31a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on April 7, 1977, and a copy thereof is set forth in the Appendix at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Is the "state action" requisite under the Fourteenth Amendment Due Process Clause and under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, prohibiting deprivation of a federally protected right while acting "under color of" state law, present in the enforcement of a lien by a warehouseman after default in payment of storage charges as provided under New York Uniform Commercial Code Section 7-210(2)?

II. Is a New York warehouseman's right of lien sale under the Uniform Commercial Code in satisfaction of delinquent storage charges an exercise of power traditionally associated with sovereignty which has been delegated to the warehouseman by the state so as to bring the sale within the purview of the Fourteenth Amendment as the action of the state?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appended to the Petition beginning at 48a of the Appendix are the following relevant constitutional provisions and statutes: Amendment XIV, Section 1, to the United States Constitution (in part); Section 7-210, Subd. (2) of the New York Uniform Commercial Code; Section 1 of the 1871 Civil Rights Act, 42 U.S.C. §1983, and its Federal jurisdictional counterpart, 28 U.S.C. §1343(3).

STATEMENT OF THE CASE

This case involves the constitutionality of a warehouseman's right to enforce his lien for default in payment of his charges in conformity with §7-210(2) of the New York Uniform Commercial Code. This Code provision is substantially the same in 49 states and in the District of Columbia.

Petitioners are the defendant household warehouseman corporation and its president individually. Respondents SHIRLEY HERRIOTT BROOKS and GLORIA JONES are former bailors of the stored household goods. Four associations of commercial warehousemen and the Attorney General of the State of New York were permitted to intervene in the action by the District Court as parties defendant. These intervenors, having not joined in this petition, are designated as respondents in this Court pursuant to Sup. Ct. R. 21, Subd. 4.

The household goods of respondents were picked up by, and stored with, petitioner warehouseman in separate transactions following court evictions from each respondent's apartment. In the course of the storage service, respondents failed to pay the charges thereby incurred and the warehouseman threatened to sell the contents at public auction as permitted by N.Y.C.C.C. §7-210(2). No sale took place in either case.

On September 21, 1973 respondent BROOKS commenced this action as a class action in the United States District Court for New York's Southern District. Federal jurisdiction was invoked under the Civil Rights Act of 1871, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343(3). Respondent Jones intervened in the action, by permission of the District Court. Both respondents sought compensatory damages, permanent injunctive relief and a declaration of unconstitutionality under 28 U.S.C. §§2201 and 2202. The propriety of the class action was never certified under Fed. R. Civ. P. 23(c), although petitioners originally stipulated thereto. The five intervening defendants did not so stipulate at any time.

By decision and order entered July 7, 1975, the District Court denied respondents' motion for summary judgment and granted petitioners' cross-motion to dismiss the complaint for lack of Federal jurisdiction and for failure to state a claim upon which relief could be granted, upon the ground that the requisite "state action" necessary to sustain a claim under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) is absent in the case of the sale of warehoused goods pursuant to the Uniform Commercial Code. The respondents appealed.

By a 2-1 vote, the Court of Appeals for the Second Circuit reversed the District Court's dismissal. The majority found that the statutory origin of the right of extrajudicial sale and its public function character combined to thrust the sale over the state action threshold. The dissent agreed with the District Court that the enforcement of a warehouseman's lien was never a public function and that the requisite significant degree of state involvement, the state all but compelling the challenged activity, is not present in the case of a warehouseman's lien sale.

The Court of Appeals remanded the action to the District Court for class-action determination and for further proceedings on the issue of whether the Uniform Commercial Code's statutory scheme comports with due process.

The technical nonfinality of the Court of Appeals judgment is not a bar to petitioners' request for review. 28 U.S.C. §1254(1) gives the Supreme Court certiorari jurisdiction over circuit courts to review interlocutory decisions, even ones denying a motion to dismiss the complaint. *Land v. Dollar,* 330 U.S. 731 (1974); *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); R. Stern and E. Gressman, *Supreme Court Practice,* (4th Ed. 1969), §§2.1, 2.2 and 4.19, pp. 26-27, 180-182. The lack of finality is not a bar to Supreme Court review so long as the Court of Appeals' ruling "is fundamental to the further conduct of the case." *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1944); *Land v. Dollar, supra,* 330 U.S. at n.2, *Gillespie v. U.S. Steel Corp.,* 379 U.S. 149, 153 (1964).

Prior to oral argument in the Court of Appeals the petitioner warehouseman's claims for storage charges were settled and the stored goods were returned to respondents (Appendix, 11a, 12a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in diametrical conflict with the decision of the United States Court of Appeals for the Ninth Circuit on the same matter.

On August 2, 1976, while respondents' appeal of the District Court's dismissal to the Second Circuit Court of Appeals was under advisement, the United States Court of Appeals for the Ninth Circuit rendered its unanimous decision in *Melara v. Kennedy,* 541 F.2d 802, *reh. and reh. en banc denied* (Oct. 8, 1976), holding that the extrajudicial sale of stored household goods to enforce a warehouseman's lien under California Commercial Code §7210, virtually identical to N.Y.U.C.C. §7-210(2), does not constitute "state action" within the meaning of the Fourteenth Amendment and of Section 1 of the Federal

Civil Rights Act of 1871, 42 U.S.C. §1983. No appeal has been taken from this decision.

In *Melara,* a household warehouseman upon default in payment of its storage charges noticed a date for sale of the stored goods in satisfaction of the delinquent charges pursuant to California Commercial Code §7210(2). The goods' owner thereupon filed suit in the Federal District Court seeking pecuniary and declaratory relief under 42 U.S.C. §1983, upon the ground that the proposed extrajudicial sale violated his due process rights. The Federal District Court for the Northern District of California dismissed the complaint for failure to state a claim, holding that the threatened sale did not constitute "state action". *Melara v. Kennedy,* Civ. No. C-74-1535 ACW (N.D. Cal. 1974).

In affirming the District Court dismissal, the Ninth Circuit reached a conclusion diametrically opposed to the Second Circuit's decision finding state action present in a warehouseman's lien sale. The Second Circuit rests its decision on two grounds: the historical fact that the warehouseman's right of sale is a creation of statute, not existing at common law; and its opinion that the lien sale represents the exercise of a traditional public function, that of finally resolving disputes over storage charges, which has been delegated to the warehouseman by the State. The Ninth Circuit, citing the same Supreme Court precedents calling for a careful "sifting and weighing" analysis of the state action issue, *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961), rejects both grounds, dismissing the statutory origin test as "a factor of dubious worth", *Melara v. Kennedy, supra,* 541 F.2d at 805, and finding no public function in the lien sale, in that the State never has had to conduct forced sales of warehoused household goods, also in that the sale is not comparable to the judgment-levying function of a sheriff.

The Second Circuit itself recognizes the conflict between the two circuits, stating in its opinion below:

> "We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in Melara v. Kennedy, *supra.* We have given that case due consideration but we disagree with its conclusion and are unpersuaded by its analysis." (Appendix, *infra,* at 25a).

The direct conflict between the Second and Ninth Circuits on whether state action is present in a warehouseman's lien sale is further complicated by a recent decision in the Eighth Circuit. In *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.,* 45 U.S.L.W. 2575 (8th Cir. May 12, 1977), *reh. denied* (June 9, 1977), the Eighth Circuit found "state action" present in a lien sale by a warehouseman acting under North Dakota Commercial Code §7-210, N.D. Cent. Code §41-07-16. Mr. Justice Clark's opinion distinguishes *Melara v. Kennedy, supra,* pointing out that the North Dakota statute was enacted in 1967 whereas the California statute goes back to 1872. Therefore, he held, in North Dakota the foreclosure of the warehouseman's lien traditionally has been a function of the sheriff, while in California foreclosure has been private conduct by the warehouseman acting under statute for approximately one hundred years.

The Eighth Circuit's reliance on the public-function theory of state action is in accord with the decision below of the Second Circuit and in direct conflict with the Ninth Circuit. The Eighth Circuit's application of the theory, however, based upon the age of the statute, would require an opposite result to that reached by the Second Circuit below. The foreclosure of a lien, based upon the Eighth Circuit's analysis, is not a traditional public function in New York since it has been private conduct by the warehouseman acting under statute for approximately one hundred years (Appendix, *infra,* at 19a).

II.

The decision of the court below determines an important question of "state action" arising under the Federal Constitution and civil rights laws, which has not been, but should be, settled by this Court.

The question of whether "state action" is present within the meaning of Section 1 of the Fourteenth Amendment, and under the Civil Rights Act, 42 U.S.C. 1983, is an important question of Federal constitutional and civil rights law. Since the *Civil Rights Cases,* 109 U.S. 3 (1883), it has been established that the Fourteenth Amendment applies solely to the actions of the state, and conversely, that private conduct, "however discriminatory or wrongful," is immune from its proscriptions, *Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The threshold question in any legal action invoking the Fourteenth Amendment, therefore, is whether the conduct under scrutiny is state action. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308 (1968); *Evans v. Newton,* 382 U.S. 296 (1968). A finding that the conduct in question is "private" in nature, and thus immune from the Fourteenth Amendment, ends the constitutional inquiry. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 377 (1974). A converse finding that state involvement is present in the challenged activity may also be dispositive of the entire case if there is no substantial issue concerning abridgement of Fourteenth Amendment guarantees. *Peterson v. City of Greenville,* 373 U.S. 244 (1963); *Terry v. Adams,* 345 U.S. 461, *reh. denied,* 345 U.S. 1003 (1953). And, if the Fourteenth Amendment is used as a sword rather than a shield to vindicate deprivations of constitutional rights under the civil rights laws, "state action" goes beyond the threshold inquiry to become one of the key elements of recovery in the plaintiff's prima facie case. See 42 U.S.C. §1983; *Adickes v. S. H. Kress and Co.,* 398 U.S. 144, 150, 188-190 (1970) (Opinion of Court and Opinion of Brennan, J., concurring and dissenting).

The importance of the "state action" question is evidenced by the frequency with which it has been interposed as a defense to the many Fourteenth Amendment due process challenges maintained in recent years against various collection remedies of "self-help" creditors. The Court of Appeals below cites 13 cases in the circuit courts alone raising the issue in an economic due process context, including three cases decided by the Second Circuit itself: *Shirley v. State Nat'l Bank,* 493 F.2d 739, *cert. denied,* 419 U.S. 1009 (1974) (peaceful repossession; no state action); *Bond v. Dentzer,* 494 F.2d 302, *cert. denied,* 419 U.S. 837 (1974) (wage assignment; no state action); *Hernandez v. European Auto Collision, Inc.,* 487 F.2d 378 (1973) ("garageman's" lien; "state action" not expressly decided). In these cases whether a subsisting contract provided for the remedy, whether the remedy existed at common law or was created by statute, and whether the remedy could be characterized as a public function, factors given crucial weight by the Court of Appeals below, were taken into consideration, "to varying degrees and with varying results." (Appendix, *infra,* at 16a).

As the Court of Appeals below noted, the Supreme Court has never addressed the important "state action" issue in regard to creditors' summary remedies such as the warehouseman's right of sale being challenged in the instant case.* The Court's latest pronouncement on the state action issue, *Jackson v. Metropolitan Edison Co., supra,* holding that a utility company's unilateral termination of service to a household for nonpayment of bills did not constitute "state action", is as close

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* In its quartet of economic due process decisions, *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Fuentes v. Shevin,* 407 U.S. 67, *reh. denied,* 409 U.S. 902 (1972); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975), the Supreme Court was not called upon to make a threshold "state action" determination on the applicability of the Due Process Clause of the Fourteenth Amendment.

as the Court has come to deciding the questions squarely presented by the decision below. The Court in *Jackson* left these questions open, stating, at 419 U.S. 352-53:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

The Supreme Court should resolve these important questions of Federal law. They have been extensively litigated producing conflicting results and divergent theories of state action in relation to the Uniform Commercial Code. Thus, on the constitutionality of the warehouseman's lien laws, the present state of the law is such that statutory provisions authorizing summary sale of stored goods to satisfy unpaid charges are subject to being struck down in Federal court in one part of the country, as violative of due process, whereas elsewhere the identical provisions are considered to be beyond Fourteenth Amendment purview. The impact of this anomaly upon the public requires disposition of the state action questions presented in this petition by the United States Supreme Court.

CONCLUSION

The Second Circuit decision is in direct conflict with the Ninth Circuit decision in *Melara v. Kennedy*, on the same matter. It ought to be reviewed to resolve this conflict, which has been compounded by the Eighth Circuit's decision in *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*

The Supreme Court has not considered the state action question in cases involving due process challenges to summary creditors' remedies provided under the Uniform Commercial Code and other creditor-debtor laws of the several states. In light of the many lower Federal courts that have considered the question, with varying results, this important question of Federal law should be settled by the highest Court.

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

s/ Alvin Altman

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Flagg Brothers, Inc. and
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Alvin Altman
Michael J. Barnas
Brodsky, Linett, Altman & Schecter
Of Counsel

APPENDIX

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. JAMES S. HOLDEN

HON. FREDERICK vanPELT BRYAN
District Judges

Shirley Herriot Brooks, Gloria Jones, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Flagg Brothers, Inc., individually and as representatives of a class of all others similarly situated, Henry Flagg, individually and as President of Flagg Brothers, Inc., The American Warehousemen's Association of the International Association of Refrigerated Warehouses, Inc., The Warehousemen's Association of New York and New Jersey, Inc., and The Cold Storage Warehousemen's Association of the Port of New York,

Defendants-Appellees.

Judgment of the Court of Appeals

75-7437

Filed
Apr. 7, 1977
A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—September Term, 1975.

(Argued February 13, 1976 Decided April 7, 1977.)

Docket No. 75-7437

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

Before:

TIMBERS, *Circuit Judge,* and
HOLDEN* and BRYAN,** *District Judges.*

* James S. Holden, Chief Judge of the District of Vermont, sitting by designation.

** Frederick vP. Bryan, Senior District Judge of the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, dismissing, for lack of state action, plaintiff's complaint challenging §§7-209 and 7-210 of the New York Uniform Commercial Code as violative of 42 U.S.C. §1983 and the due process clause of the fourteenth amendment to the United States Constitution.

Reversed and remanded.

MARTIN A. SCHWARTZ, Esq., White Plains, N.Y. (The Legal Aid Society of Westchester County, White Plains, N.Y., on the brief, Lawrence S. Kahn, Evelyn Isaac, of counsel), *for Plaintiffs-Appellants.*

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ARNOLD H. SHAW, Esq., New York, N.Y. (Jaffe, Shaw & Rosenberg, New York, N.Y., on the brief), *for Defendants-Appellees Warehousemen's Association of New York and New Jersey, Inc., and the Cold Storage Warehousemen's Association of the Port of New York.*

A. SETH GREENWALD, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, State of New York, and Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for Defendant-Appellee Louis J. Lefkowitz, Attorney General of the State of New York.*

BRYAN, *Senior District Judge:*

New York Uniform Commercial Code §7-209 grants a warehouseman a lien upon goods in his possession for charges incurred in connection with storage, and permits him to retain the goods until such charges are satisfied. New York Uniform Commercial Code §7-210 gives the warehouseman the power to enforce his lien by selling the stored goods, after complying with specified procedures.[1]

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1 The full text of the statutes in question follows:

§ 7—209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no

This statute provides that notice of a prospective sale be given to the owner of the stored goods. It does not, however, contemplate any judicial determination of the amount owing prior to the sale of the goods in satisfaction of the warehouseman's charges.

charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

§ 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

The question presented by this appeal is whether the warehouseman's enforcement of his lien in this manner constitutes action "under color of" state law within the meaning of 42 U.S.C. §1983 or state action under the

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against

fourteenth amendment.[2] We hold that it does, and therefore reverse the lower court's dismissal of the complaint and remand for a determination of whether the statutory scheme involved comports with due process.

I.

Since the case comes before us on the dismissal of the complaint, we accept the plaintiffs' allegations of fact as true. *See Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

The original plaintiff in this case, Shirley Herriott Brooks, was a resident of Mount Vernon. On June 13, 1973, pursuant to an order of eviction of the City Court of Mount Vernon, the city marshal removed Brooks and her possessions from her apartment. Brooks told the marshal that she wanted to call someone to store her furniture and other household goods. The marshal informed her that she could not do so and that the man with him, defendant Henry Flagg, president of defendant Flagg

whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

2 The "under color of" state law provision in §1983 is equivalent to the state action requirement of the fourteenth amendment. *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739, 741 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), citing *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 n.7 (1970) and *United States* v. *Price,* 383 U.S. 787, 794-95 n.7 (1966).

Brothers, Inc., would store her furniture. Flagg told Brooks that she would have to pay $65 per month for the moving and storage of her furniture. Brooks replied that this sounded like a high price but, believing that she had no choice, authorized Flagg to proceed with the moving and storage of her furniture and household possessions.

As soon as her goods were loaded on Flagg's trucks, one of the moving men told Brooks that she would have to pay $178—$75 per month for storage, $75 for barreling and platforming, and $28 for fumigating. Brooks protested that the entire job was only to cost $65, but eventually handed over a check for $178.

On or about June 15, 1973, Brooks called Flagg Brothers to find out how long it would store her goods for the $178 payment. She was informed that she already owed an additional $156. On June 19, 1973, Brooks went to the Flagg Brothers office. She was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Flagg Brothers regarded the $178 payment as a deposit and that there was a "balance due" of $156.[3] Brooks told Henry Flagg that the charges were unreasonable and that she could not pay them. He told her that on the first of July, 1973 she would owe an additional $75 for storage for the month of July. Brooks argued that her storage

3 We reject Flagg Brothers' assertion that Brooks agreed to sale upon default in payment by accepting, some six days after the initial storage, the "Combined Uniform Household Goods Bill of Lading and Freight Bill" which in minute print referred to sale by the warehouseman in the event of nonpayment of storage charges. *See Fuentes* v. *Shevin,* 407 U.S. 67, 94-96 (1972). We thus view the authorization of sale of stored goods by Flagg as arising solely from §7-210, specifically subsection (2) which governs enforcement of a warehouseman's lien on goods other than goods stored by a merchant in the course of his business, and not from any contractual provisions. This is undoubtedly the case with respect to plaintiff Jones, who alleges that she never authorized storage of her goods, *see infra* at 4. The court below adopted this analysis, at least in part.

payment on June 13, 1973 should run to July 13, 1973, but Flagg insisted that, since storage charges are computed on a "per month" basis, even if her goods had been stored on June 29, 1973 an additional $75 would still be due on July 1, 1973.

The dispute over storage charges continued. On August 25, 1973, Brooks received a letter from Flagg Brothers informing her that unless she paid her outstanding balance of $306 within 10 days, her furniture would go up for sale. This letter was accompanied by a "Final Notice" informing Brooks that, unless payment on her storage account were made, Flagg Brothers would advertise her goods for public auction.

On September 21, 1973, Brooks instituted this action on behalf of herself and a proposed class consisting of

> persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

Relying upon 42 U.S.C. §1983[4] and its jurisdictional counterpart, 28 U.S.C. §1343(3),[5] she sought injunctive and

4 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5 28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

declaratory relief and damages on the ground that the detention and threatened sale of her goods pursuant to New York Uniform Commercial Code §§7-209 and 7-210 violated the due process clause of the fourteenth amendment. Named as defendants were the Mount Vernon marshal,[6] Henry Flagg, and Flagg Brothers, Inc., individually and as representative of a proposed defendant class consisting of

> warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 [sic] without affording the owner of the goods a prior opportunity to be heard.

In accordance with an agreement between counsel, on January 24, 1974, subsequent to the filing of the complaint, Brooks was permitted to remove her possessions from Flagg Brothers' warehouse without paying the disputed storage charges. Then in February, 1974 counsel stipulated that the action, with the classes described substantially as above, was a proper plaintiff and defendant class action under Fed. R. Civ. P. 23 with respect to the claims for injunctive and declaratory relief. These stipulations, however, were never approved by then District Judge Gurfein, to whom the case was assigned.

On June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as party plaintiff pursuant to Fed. R. Civ. P. 24. Jones' allegations were parallel to

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

6 The action was subsequently dismissed as to the marshal by agreement of the parties.

those of Brooks. She, too, had been evicted by the Mount Vernon marshal, who was accompanied by an employee of Flagg Brothers. Jones denies, however, that she ever authorized Flagg Brothers to store her goods "either by written or oral contract, or otherwise," and claims that she was never advised of the rate she would have to pay for the storage of her household belongings. At the time of her proposed intervention, Jones' goods were still being retained by Flagg Brothers, who informed her counsel that they had no present intention to sell the goods and would inform him well in advance if they did decide to sell them.[7]

By the same order that granted Jones' motion to intervene, Judge Gurfein permitted the Attorney General of the State of New York, the American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc., the Warehousemen's Association of the Port

7 It appears that after the district court rendered its decision of July 7, 1975 dismissing the complaint, *see infra* at 5, Mrs. Jones informed her counsel that she had paid Flagg $1,600 for the return of her goods; that she did not receive all of her goods back; that some of her goods were received in damaged condition; and that she did not make the $1,600 payment voluntarily but only because of alleged threats of sale and the twenty-month detention of the goods.

Thereafter, by letter dated December 15, 1976, while this appeal was *sub judice*, Jones' counsel informed the court pursuant to Fed. R. App. P. 43 that he had learned of her recent death.

It is well settled that a plaintiff's cause of action under 42 U.S.C. §1983 survives for the benefit of the estate if the applicable state law creates a right of survival. *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961). *See also Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (§1983 claim survives plaintiff's death after suit was brought even though it would abate under applicable state law). Jones' claims for relief would survive under New York Estates, Powers and Trusts Law §§11-3.1, 3.2(b), and thus are not abated by her death for purposes of this suit. Accordingly, counsel for Jones requests that, in the event of reversal, the case be remanded to the district court with leave for substitution of her personal representative pursuant to Fed. R. Civ. P. 25(a).

of New York, Inc.,[8] and the Cold Storage Warehousemen's Association of the Port of New York to intervene as parties defendant. *Brooks* v. *Flagg Brothers, Inc.*, 63 F.R.D. 409 (S.D.N.Y. 1974). The Attorney General was allowed to intervene on consent. Judge Gurfein permitted the trade associations to intervene over the objection of plaintiffs' counsel. The associations claimed that their members were engaged in large scale warehousing on behalf of merchants and other commercial entities functioning in interstate commerce, and argued that their interests in upholding the constitutionality of §§7-209 and 7-210 would not be adequately represented by Flagg Brothers, whose business was the moving and storage of furniture and other household goods.

On August 26, 1974, plaintiffs moved for class certification as to both plaintiffs and defendants, and for summary judgment on the question of the constitutionality of §§7-209 and 7-210. On September 19, 1974, the Flagg defendants moved to dismiss the action for failure to state a claim upon which relief can be granted.

By decision and order dated July 7, 1975, Judge Werker, to whom the case had been reassigned, denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint. Applying the analysis of *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975),[9] Judge Werker concluded

8 The Warehousemen's Association of the Port of New York, Inc., subsequently amended its certificate of incorporation to change its name to "Warehousemen's Association of New York and New Jersey, Inc."

9 In *Jackson*, Judge Smith specified five factors that are "particularly important" to a determination of state action:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to

that in imposing and enforcing his lien pursuant to §§7-209 and 7-210, the warehouseman does not act "under color of" state law within the meaning of 42 U.S.C. §1983. He dismissed the action for failure to state a claim under 42 U.S.C. §1983 without passing upon the due process claims or the class certification questions. This appeal followed.

Appellants do not presently press their challenges to §7-209, which authorizes imposition of the warehouseman's lien and retention of stored goods until it is satisfied.[10] They do, however, contend that enforcement of the warehouseman's lien by sale pursuant to §7-210 constitutes state action because the statute (1) delegates to the warehouseman uniquely governmental power and (2) expands the remedies available to the warehouseman beyond those which he possessed at common law. On the present record, this question is properly before us for decision. *See Tedeschi* v. *Blackwood*, 410 F. Supp. 34, 38-41 (D. Conn. 1976) (three-judge court) and cases there cited. *See also Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 752-757 (1976).

II.

The state action inquiry is not an easy one. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Au-*

which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Each of these factors is material; no one factor is conclusive.

496 F.2d at 629.

10 However, they state that they wish to preserve this point for possible review by the Supreme Court.

thority, 365 U.S. 715, 722 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

The first step in the resolution of this question is to identify correctly the particular kind of state action allegation with which the court is dealing. This is because standards for determining state action have been formulated in many different contexts, and the resulting formulations are not often interchangeable. For example, the criteria for finding state action in equal protection cases involving charges of racial discrimination are easier to meet than those formulated in cases such as that at bar. *See, e.g., Coleman* v. *Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, *J.* concurring); *Jackson* v. *Statler Foundation, supra*, at 628-29; *Girard* v. *94th St. and Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). Similarly, tests for determining whether the state has become so entwined with a private entity—by financially supporting it, regulating it, or otherwise—as to make the actions of the private entity the state's own, are not of much help in resolving other types of state action problems.

In this case, Judge Werker used the factors enumerated in *Jackson* v. *Statler Foundation, supra*, at 629, *see supra* n.9, to determine whether state action was present. The *Jackson* factors, however, developed in a case where the appellant sought to characterize the allegedly racially discriminatory activities of certain private foundations as state action by virtue of the foundations' tax exempt status, are not particularly enlightening when applied to the factual situation at hand. The instant case involves a question of alleged delegation of distinctly governmental power,

which can best be resolved by reference to cases involving similar facts.

The Supreme Court has not yet squarely addressed the question of whether a delegation of state authority to creditors constitutes state action. Its only comment on the subject came in *Jackson* v. *Metropolitan Edison Co., supra,* where the Court rejected a claim that state action was present in a tariff-authorized termination of electric service by a privately owned and operated utility corporation holding a certificate of public convenience issued by the Pennsylvania Utility Commission. The Court there noted:

> If we were dealing with the exercise by [the power company] of some power delegated to it by the State which is traditionally associated with sovereignty . . . our case would be quite a different one.

419 U.S. at 352-53.

Several circuit courts, however, have decided the state action question in cases involving due process challenges to summary creditors' remedies similar to that presented here. These cases have focused on essentially the same factors (whether the state has delegated one of its unique powers to a private person; whether the common law rights of the creditor were expanded or merely codified; whether the creditor's power amounts to a roving commission or exists only over particular chattels that are closely connected with the debt; whether the creditor's remedy was authorized by contract as well as statute; whether the creditor's resort to the remedy was mandatory or optional; whether the state extensively regulates the creditor's industry; and even whether title rests in the debtor or creditor) to varying degrees and with varying results. *See Culbertson* v. *Leland,* 528 F.2d 426 (9th Cir. 1975) ("innkeeper's" lien; state action); *Hall* v. *Garson,* 430 F.2d

430 (5th Cir. 1970) ("innkeeper's" lien; state action); *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975) ("innkeeper's" lien; no state action); *Anastasia* v. *Cosmopolitan National Bank of Chicago,* 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976) ("innkeeper's" lien; no state action); *Philips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975) ("garageman's" lien; no state action); *James* v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974) (repossession; no state action); *Adams* v. *Southern California First National Bank,* 492 F.2d 324 (9th Cir.), *cert. denied,* 419 U.S. 1006 (1974) (repossession; no state action); *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir.), *cert. denied,* 419 U.S. 1001 (1974) (bank's right of set-off; no state action); *Melara* v. *Kennedy,* 541 F.2d 802 (9th Cir. 1976) (enforcement of warehouseman's lien under California Commercial Code §7210; no state action).

Appellants here specify only two factors which point to state action in the warehouseman's enforcement of his lien. We conclude, however, that the combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action.

New York Uniform Commercial Code §7-210 provides the warehouseman with a truly extraordinary remedy. After giving the bailor specified notice, *see supra* n. 1, the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally.

The Supreme Court has already shown its grave concern over even temporary deprivations of property without

prior judicial determination of the amount owing in a series of cases challenging various provisional remedies afforded creditors. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). These cases stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. The statutory scheme before us, in contrast, contemplates no judicial—or even impartial—determination of the amount owing before a final deprivation of property.

This would be quite beside the point if the state were not implicated in the warehouseman's enforcement of his lien. But by enacting §7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, *see Shirley* v. *State National Bank of Connecticut, supra,* at 747 (Kaufman, *C.J.*, dissenting); *Bond* v. *Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974) (Kaufman, *C.J.*, dissenting), but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff.[11]

11 *Blye* v. *Globe-Wernicke Realty Co.*, 347 N.Y.S.2d 170 (1973). There, in finding that an innkeeper's enforcement of his lien pursuant to New York Lien Law §181 involves state action and violates due process, the New York Court of Appeals stated:

> In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52) traditionally has been the function of the Sheriff.

347 N.Y.S.2d at 175. *See* also *Sharrock* v. *Dell Buick-Cadillac, Inc.*, —— N.Y.S.2d —— (App. Div. 2d Dept., decided March 28, 1977).

We do not agree with Judge Werker's attempt to distinguish *Blye* on the ground that the liens referred to there all involve execution upon goods having no particular relationship to the debt owing. A "conventional security interest" would include the typical purchase money security interest where the debt and security are fundamentally related.

Moreover, we are reluctant to rely heavily in the state action inquiry upon whether the property executed upon is closely connected to the alleged debt or not connected at all. This consideration bears only upon the extent of the intrusion upon the debtor's property rights that the state has authorized, and not upon whether the state has in fact delegated some of its sovereign power.

This delegation expanded the warehouseman's remedies far beyond those existing at common law. There the warehouseman, in the absence of an express agreement authorizing sale upon default, could only retain the goods to coerce payment; he could not sell the goods and apply the proceeds to the debt. R. Brown, The Law of Personal Property §108, at 519, §119, at 588-89 (2d ed. 1955).[12] If mere detention of the goods failed to bring about payment, the warehouseman had to resort to the courts to obtain a judgment for the charges due and then deliver a writ of execution to the sheriff, who would sell the goods pursuant to the requirements of state law and deliver the proceeds to the warehouseman. *See* 62 N.Y. Jur. *Warehouse Receipts* §125, at 747, 747 n.2. Only in 1879[13] did the warehouseman for the first time become empowered to sell stored goods in satisfaction of delinquent charges.[14]

Appellees argue that the alteration of common law rights which took place is of little significance, citing the following passage from Burke and Reber, *State Action, Congres-*

12 *See also Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y. Sup. Ct. 1832); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-45 (1900).

13 We note in passing that this was subsequent to the enactment of the fourteenth amendment.

14 *See* Ch. 336 [1879] N.Y. Laws 417. This statute underwent various amendments and reenactments, not here pertinent, before assuming its present form with the adoption of the Uniform Commercial Code in 1962. *See* Ch. 421, [1883] N.Y. Laws 592; Ch. 526, [1885] N.Y. Laws 891; Ch. 418, [1897] N.Y. Laws 514; Ch. 369, [1899] N.Y. Laws 793; Ch. 732, [1907] N.Y. Laws 1706; Ch. 588, [1949] N.Y. Laws 1339.

sional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1 (1973):

> The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.

Id. at 47.

We of course agree that an alteration in the common law remedy alone is not dispositive of the state action inquiry. But we reject the authors' conclusion that statutes such as §7-210 have only a minor impact on "private ordering."

Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judicially established, and then have the sheriff execute upon the goods which he concededly has the common law right to hold as security. The action of the state in granting the warehouseman the privileged position he enjoys under §7-210, even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested

judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment,[15] it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action.

The result we reach today accords with prior decisions of this circuit which conducted similar state action inquiries.

In *Shirley* v. *State National Bank of Connecticut, supra,* the plaintiff's automobile was peacefully repossessed by an assignee of the conditional seller, pursuant to a contractual provision. The plaintiff challenged the constitutionality of the Connecticut statute which authorizes such repossession if the sales contract expressly makes default a ground for retaking the property. In concluding that state action was not present, the court, with Chief Judge Kaufman dissenting, relied heavily on the fact that Connecticut creditors had a common law right to peaceful repossession without a hearing, and that the statutory enactment only increased protection of installment purchasers. Judge Mulligan reasoned that

> since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action. No delegation of traditional state power has been granted to any private person.

493 F.2d at 743.

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15 This value is nonexistent, however, when a private party wields power that belongs to the state and is subject to egregious abuse if not regulated.

In *Bond* v. *Dentzer, supra,* the same panel which decided *Shirley* faced a similar question: whether the unilateral filing of wage assignments by creditors with their debtors' employers, as authorized by the New York wage assignment statute and pursuant to specific loan agreements, constitutes state action. Once again the court, with Chief Judge Kaufman dissenting, found no state action, rejecting the plaintiffs' "partnership," "encouragement," and "traditional state functions" theories. The partnership argument fell because of the lack of state "entwinement" with the defendant finance companies. The other arguments failed because the state had "not deprived the plaintiffs of anything," 494 F.2d at 307:

> [T]he legislation does not vest the assignee with any function traditionally performed by the State. The function of the wage assignment has always been that of a private levy without a prior court order. There was never any requirement or practice which has been called to our attention which mandated the creditor to first establish the debt before attaching the wages and which the State has now abrogated. In fact, as our prior discussion indicates, the State has created a right on the part of the debtor to question the debt by initiating an action which was not known at common law. In sum, the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law.

494 F.2d at 311.

The distinctions between the facts of *Shirley* and *Bond* and those of the case at bar are manifest. In neither of those cases was there any expansion of common law creditors' remedies or delegation of power traditionally

exercised by the state—the precise factors which we deem determinative in the present state action inquiry.[16] *See also Tedeschi* v. *Blackwood, supra,* at 42 n.10.

In the most recent case on the subject in this circuit, *Tedeschi* v. *Blackwood, supra,* Judge Smith, writing for a three-judge district court in Connecticut, concluded that statutory provisions permitting the foreclosure by sale of a garageman's lien for towing and storage—analogous to §7-210—involved state action and violated due process.

The statutory scheme at issue in *Tedeschi* empowered a police officer or motor vehicle inspector who determined that a motor vehicle had been abandoned, unregistered, or dangerously parked to have the vehicle towed to a garage for storage. All towing and storage charges incurred became a lien on the vehicle which in time could be foreclosed by the garage through its sale of the vehicle. The statute did not, however, afford a right to a hearing to a person wishing to contest the application of either its towing or its lien provisions to his vehicle.

Judge Smith found state action present in the implementation of the towing provisions by virtue of a state agent's "meaningful participation" by initiating all such towings. He then ruled that state action was present in the creation of the garageman's lien because, rather than merely "acknowledging" the legality of private conduct, this statute "authorized" conduct which would otherwise be impermissible.[17] Finally, he concluded that

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16 A further distinguishing feature of both *Shirley* and *Bond* is that the courts there concluded that the creditors' remedies in question were specifically authorized by contracts underlying the debts. Contrast n.3, *supra.*

17 Judge Smith observed:

> While Connecticut common law may recognize the legality of a garage lien for services on a vehicle voluntarily surrendered for the performance of these services, it does not recognize such a lien where the garage has gained possession of the vehicle without the

> taken *by itself,* the foreclosure of a garagekeeper's lien pursuant to §14-150 to cover towing and storage charges also constitutes "state action," [18]

410 F. Supp. at 42 (emphasis added), and noted that in *Hernandez* v. *European Auto Collision,* 487 F.2d 378 (2d Cir. 1973), this court gave a strong indication that it would find such foreclosure or sale provisions unconstitutional.

The plaintiff in *Hernandez,* whose car was auctioned off by a garageman after he refused to pay for allegedly unauthorized repairs, challenged the pertinent sale provision of the New York Lien Law. Without expressly addressing the issue of state action, the court, in an opinion by Judge Wyzanski, ruled that, if the facts were as plaintiff claimed, he had a tenable contention that the lien law as applied violated the due process clause. It directed the district court to try the case on its merits. Judge Timbers, in a concurring opinion joined by Judge Lumbard, would have taken the further step of directing the district court to declare the sale provisions unconstitutional as applied if Hernandez were able to prove his allegations. 487 F.2d at 383.

Appellants here argue that state action was found *sub silentio* by the *Hernandez* court, and point out that the plaintiff in that case briefed the point on appeal. While

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owner's consent. *See Paton* v. *Robinson,* 81 Conn. 547, 554, 71 A. 730 (1909).

410 F. Supp. at 42.

18 Judge Smith may have qualified this conclusion somewhat when he observed later in his opinion:

> Thus, even if, when considered by itself, the implementation of the lien provisions did not result in "state action", it would still be infected by the "state action" resulting from the implementation of §14-150's towing provision.

410 F. Supp. at 43.

such a *sub silentio* jurisdictional ruling is not binding precedent in this court, *United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952), we note Chief Judge Kaufman's dissent in *Shirley* v. *State National Bank of Connecticut, supra,* at 745-47, particularly his statement that the garageman's right of sale at issue in *Hernandez* did not exist at common law. *See also Sharrock* v. *Dell Buick-Cadillac, Inc., supra.*

We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara* v. *Kennedy, supra.* We have given that case due consideration, but we disagree with its conclusion and are unpersuaded by its analysis.

The case is reversed and remanded to the district court. On remand, the first question to be resolved is that of class determination,[19] because that may have an important bearing on the resolution of due process claims. Since the named plaintiffs in this case were consumers who stored personal belongings with Flagg Brothers and not merchants, the only constitutional challenge they can make individually is to §7-210(2), which authorizes enforcement of the warehouseman's lien upon goods "other than goods stored by a merchant in the course of his business." §7-210(1) is an entirely distinct provision which authorizes enforcement of the warehouseman's lien in the typical commercial warehousing situation, and defendant trade associations have raised a serious argument that a summary sale provision in this context may be constitutionally unobjectionable. *See D. H. Overmeyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972). The constitutionality of §7-210(1) will not be before the court, however, unless commercial warehouses

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19 Leave is hereby granted for substitution of Jones' personal representative as plaintiff pursuant to Fed. R. Civ. P. 25(a). *See* n.7, *supra.*

are determined to be within a defendant class against which suit is brought by an appropriate class of plaintiffs.

Reversed and remanded.

HOLDEN, *District Judge*, dissenting:

I respectfully dissent. I am persuaded, as Judge Werker was, that his court was without jurisdiction and would affirm the dismissal of the action.

The unfortunate plight which confronted the plaintiff Brooks, following her eviction in June 1973, inspires concern. And Mrs. Jones was similarly situated when she was evicted in November of the same year. According to the complaints they were victimized by the overbearing of the defendant warehouseman. But on the facts alleged the State of New York was not a participant in the action taken by the defendant Flagg.

The defendant retained the bailed property under an ancient possessory lien conferred by the common law.[1] *See Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y.Sup. Ct. 1832); *cf. Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-645 (1900). *See also* R. Whitaker, A Treatise of the Law Relative to the Rights of Lien and Stoppage in Transitu 13-14 (1816). While the complaints speak of threats of sale, that drastic remedy was not applied; the property has been returned to both plaintiffs.[2]

The power of sale asserted by the defendant was first conferred on warehousemen by an enactment of the New

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1 The common law remedy in New York gave the warehouseman a possessory lien on the stored goods until the storage charges were paid.

2 After the action was brought, by agreement of counsel, the plaintiff Brooks removed her goods without paying the storage charges. The plaintiff Jones' storage charges were paid with protest against the amount of the charges and the goods were removed.

York Legislature in 1879. Ch. 336 [1879] N.Y. Laws 417. Thus, for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges. The majority of the court concludes that the "statutory delegation of government power and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action." According to the majority, that thrust is sufficient to generate the judicial power to uproot a statutory provision that has governed the rights and remedies between warehousemen and their bailors for many years without interdiction by the courts of New York.

I agree that the question to be searched is whether the State of New York has become so involved in the retention and threatened sale of the plaintiff's goods that defendant's action "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co., supra* at 351. Without such participation the Fourteenth Amendment affords no protection. *Id.*

Of course a state can act only by way of its legislative, executive and judicial branches. *Ex parte Virginia*, 100 U.S. 339, 347 (1880). Here there is no suggestion of state participation by judicial action. To the contrary, it is the want of judicial action that is the predicate of the complaint. And the State's executive officers were not participants in either the creation of the lien or the threat to enforce it. The State quit the arena when the evictions were accomplished, before the present controversy began. The only state involvement is through the action of the legislature in adopting the challenged provisions of the Uniform Commercial Code § 7-210.

The question, as I perceive it, is whether the remedies provided by §§ 7-209 and 7-210 of the New York Uniform Commercial Code are "commanded" by the State, or "so

entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

The roots of the present controversy are embedded in private dealings between the warehouseman and the bailors of the property that was stored in the warehouse facility. No state agency or official has intervened to sell or threaten to sell the property entrusted by the plaintiffs to the defendant warehouseman. As to non-commercial storage, such as here involved, the Uniform Commercial Code merely retained the detailed provisions for notice, publication and public sale found in Section 33 of the Uniform Warehouse Receipts Act. Uniform Commercial Code § 7-210, Official Comment 1.

In *Shirley* v. *State National Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974), the court was concerned with state action in the context of the Connecticut Retail Installment Sales Financing Act. Writing for the majority, Judge Mulligan pointed out:

> Here the right to private repossession always existed. Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards to the consumer in the conditional sales contract.

Id. at 744.

By the law of New York the enforcement of a warehousman's lien, for nearly a hundred years, has not been the function of the sheriff. As will be seen from what is written in the margin, the historical background of the challenged statute tells us that the State of New York has not been significantly involved in the enforcement of the warehouseman's lien since 1879 unless, of course, either

the bailor or bailee elected to resort to judicial action. And the statute makes no "command" that §§ 7-209 and 7-210 shall be pursued as the warehouseman's exclusive remedy. *Compare Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). The statutory history of the contested provisions of the New York Uniform Commercial Code indicates that there has been an accretion of safeguards to the mutual benefit of the parties to the bailment. *Cf. Bond* v. *Dentzer*, 494 F.2d 302, 307-09 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank, supra*, 493 F.2d at 742.

Resolution of the question of government action "hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969).

Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute state action. *Bond* v. *Dentzer, supra. See Shirley* v. *State National Bank, supra*, 493 F.2d at 744.

Unlike the majority, I am persuaded that the adoption of § 7-210 of the New York Commercial Code does not constitute state action. The reasoning pursued in *Melara* v. *Kennedy*, 541 F.2d 802 (9th Cir. 1976) on the very question presented here, appears to me to be sound. *See also Smith* v. *Bekins Moving & Storage Co.*, 384 F.Supp. 1261 (E.D. Pa. 1974).

As we have seen, New York Uniform Commercial Code §§ 7-209 and 7-210 afford a choice of remedies to both bailor and bailee. The defendant warehouseman's exercise, or threatened exercise, of the power of sale allowed by the Code, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants.

73 Civ. 4050 (HFW)

HENRY F. WERKER, D.J.

Plaintiffs Brooks and Jones are residents of Westchester County whose property was stored by defendant Flagg Brothers, Inc. following their evictions by the Mount Vernon Marshal in 1973.[1] On their own behalf and that of a proposed class of "persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code § 209 and subject to sale pursuant to New York Uniform Commercial Code § 210 because of warehouse fees allegedly due,"[2] they

challenge the constitutionality of those two statutes pursuant to 42 U.S.C. § 1983.[3] They allege deprivation of due process guaranteed by the Fourteenth Amendment of the United States Constitution, and seek declaratory and injunctive relief as well as money damages. Their proposed class of defendants includes "all . . . warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."[4]

Section 7-209 grants a warehousemen a lien on goods stored, and/or transported, for fees allegedly owed by the customer.[5] Section 7-210 gives a warehouseman the authority to enforce such a lien by public or private sale upon proper notification to the customer and adherence to commercially reasonable sale procedures.[6]

Plaintiffs have moved for class action certification of both a plaintiff and a defendant class, and for summary judgment on the question of the statutes' constitutionality. Defendants have cross-moved to dismiss for failure to state a cause of action and for lack of subject matter jurisdiction on the ground that the challenged conduct does not constitute state action within the meaning of the Fourteenth Amendment, and was not performed "under color of" state law within the meaning of § 1983.[7] Upon careful consideration of the facts in this case and the following analysis of relevant Second Circuit and Supreme Court decisions, the court finds that defendants are indeed correct. Plaintiffs' action is consequently dismissed for lack of jurisdiction.

Plaintiffs have advanced four arguments in support of their assertion that state action is present in the challenged activity. Their first argument is that the Second Circuit's decision in *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973) compels a finding of state action in this case. State

action, however, was never discussed in that opinion. In *Hernandez* plaintiff challenged the garageman's lien provisions of the New York Lien Law which allow a garageman to detain an automobile until alleged storage and repair charges are paid, and to foreclose his lien by selling the auto upon proper notification to the bailor.[8] The district court judge dismissed the complaint, noting:

> "[E]ven assuming that the defendants are acting under color of state law, the court cannot find that the plaintiffs' constitutional right to due process of law has been deprived by the operation of the challenged provisions of the lien law. Consequently, . . . the court need not go further and formally pass upon the second requirement — the presence of state action."

346 F. Supp. 313, 317 (E.D.N.Y. 1972).[9] On appeal the Second Circuit upheld the dismissal as to the detention provisions of the New York Lien Law because it found that having voluntarily delivered his car to the defendant garageman, and having never requested its return or tendered reasonable storage charges, the plaintiff had no standing to challenge the lien. 487 F.2d at 380. As to the sale provisions of the statute, however, the court noted that if, upon remand, the district judge were to find plaintiff's version of the facts as alleged,

> "then we would conclude that plaintiff has, under the doctrines enunciated in *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, a tenable contention that Section 204 of the New York Lien Law as applied here was repugnant to the due process clause of the Fourteenth Amendment. . . ."

Id. at 380-81. Neither the court's opinion nor the concurring opinion[10] in *Hernandez* mentioned or discussed the issue of state action.

Plaintiffs argue that a "finding" of state action is implicit in both *Hernandez* opinions. However, because District Judge Costantino had merely assumed the presence of state action in order to consider and dismiss the Hernandez constitutional claim on its merits, the state action issue was not properly before the Court of Appeals; the sole issue on appeal was whether, assuming state action, plaintiff had stated a claim. Furthermore, even if a finding of state action were implicit in the Second Circuit's decision, this court would not be bound by such a *sub silentio* ruling. *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 38 (1952). This court therefore concludes that the Second Circuit's decision in *Hernandez* is not dispositive of the state action issue in this case.

Plaintiffs, in their remaining argument, would have the court find state action because:

> - the warehouseman who enforces his own lien pursuant to § 7-210 is performing what has traditionally been a public function;
>
> - the state imposes extensive regulation on the warehousing industry, including regulation of the challenged activity; and
>
> - section 7-210 confers on warehousemen rights in excess of those at common law.

The question of whether state action exists usually arises with respect to private conduct upon an allegation that the conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become suject

to the . . . limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). However, as the Supreme Court noted in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972), "while the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." The answers, particularly in recent months, have varied from circuit to circuit, and even within the Second Circuit have produced division and disagreement among panels.[11]

In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975), Judge Smith enumerated five factors culled from a review of state action case law which the court found to be "particularly important to a determination of state action":[12]

> (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme;(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms.

Each of these factors is material; *no one factor is conclusive.*

* * *

> Moreover, even if one of these factors is absent, a finding of state action may still be appropriate.

Id. at 629-34 (emphasis added). Plaintiffs' second argument for state action, that in enforcing his own lien a warehouseman is performing a public function, finds support in Judge Smith's list above. Their rationale is that at common law a warehouseman could enforce his lien only by obtaining a court judgment and having the sheriff execute on it; thus, by allowing a warehouseman to enforce his lien without resort to the courts and the sheriff, § 7-210 enables him to perform an "inherently" public function. Plaintiffs rely for this theory upon *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15, 20 (1973) in which the New York Court of Appeals found that an innkeeper's execution of his own lien amounts to the exercise of a public function: "[T]he execution of a lien, be it a conventional security interest, (cite), a writ of attachment (cite), or a judgment lien (cite), traditionally has been the function of the Sheriff."

The liens referred to by the Blye court, however, all involve satisfaction of a debt having no particular relation to the goods executed upon. While such liens historically belong to the sheriff for execution, execution on goods lawfully in a warehouseman's possession, to satisfy charges *arising out of such possession,* is not traditionally a function of the sheriff; traditionally the sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien.[13] *Melara v. Kennedy,* 74 Civ. 1535, N.D. Cal., August 21, 1974. *Accord,* Collier, Procedural Due Process — Post Fuentes Constitutionality of Garageman's Liens, 54 B.U.L. Rev. 542, 554 (1974). This distinction mandates rejection of the public function theory.[14] *Cf. James v. Pinnex,* 495 F.2d 206, 208 (5th Cir. 1974); *Melara v. Kennedy, supra.* In *Melara,* a case substantially identical to the one at hand, the court held that enforcement of a lien pursuant to § 7210 of the California Uniform Commercial Code was not performance of a state or public function, and did

not constitute state action. *See also Parks v. Ford,* 72 Civ. 639, 73 Civ. 1699, E.D. Pa., December 11, 1974. (Pennsylvania's repairman's lien statutes do not so infuse private acts of detention and sale with state involvement as to render them state action).

Plaintiffs' third argument in support of state action relies upon the public function theory and must be rejected with it. They suggest that because "warehouses and warehousemen are affected with a public interest," state regulation of the industry permeates its nominally private acts with state action. This line of reasoning was effectively foreclosed by the Supreme Court in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). In that case petitioner challenged the constitutionality of the defendant's authority, under a tariff filed with the State Public Utilities Commission, to cut off her electric power without meeting the due process standards enumerated in *Fuentes v. Shevin,* 407 U.S. 67 (1972). Justice Rehnquist, writing for the Court, stated:

> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actions in all their actions.
>
> We decline the invitation for reasons stated long ago in *Nebbia v. New York,* 291 U.S. 502 (1934), . . . :
>
> > It is clear that there is no closed case or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature

> of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . In several of the decisions of this Court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been put forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.' *Id.*, at 536.

Id. at 353.

Plaintiffs seem to have anticipated such foreclosure, for they suggest in the alternative that even if the challenged activity is essentially private, state regulation of the industry is so directly and significantly involved therein that the state must be viewed as a joint participant. Under this rubric which tracks factor (2) in Judge Smith's list above, the state's "involvement" is its regulation of the warehouseman's lien sale and its failure to include in that pervasive regulation a requirement of *Fuentes* due process standards. This in essence is the theory first used by the Supreme Court in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).[15] *Burton,* however, is distinguishable in two important ways. First, in the instant case the symbiotic relationship between the state and the private defendant present in *Burton* is missing. Secondly, *Burton* was a case involving racial discrimination, and "racial discrimination is so peculiarly offensive and . . . so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." *Coleman v. Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970).[16] *See also Greco v. Orange Memorial Hospital Corp.,* 43 U.S.L.W. 2522-23 (5th Cir. 1975); *Adams v. So. Cal. First National Bank,* 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied,* 43 U.S.L.W. 3277 (1974). Thus resolution of the state action

issue in this, a non-racial case, is not controlled by the standards evolved in cases of racial discrimination.

Plaintiff's last argument, and by all appearances the sturdiest, is that by statutorily conferring on warehousemen a power not possessed at common law, the state has created an impetus for warehouseman lien sales, has encouraged such sales, and has thereby so involved itself in the challenged conduct as to transform it into state action.[17] (See factor (3) of Judge Smith's *Jackson v. Statler Foundation* list, *supra.*) The key to this argument is the alteration of common law, for the Second Circuit in recent decisions has held mere statutory codification of common law rights insufficient state involvement to constitute state action. *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974); *Shirley v. State National Bank,* 493 F.2d 739 (2d Cir. 1974). In *Shirley,* where plaintiff challenged repossession of goods purchased under an installment sales contract, the court stated:

> . . . since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action.

Id. at 743. Likewise, in *Bond,* the court found that state action was not present in an assignment of wages made pursuant to New York's wage assignment statute because "the statute has not given the assignee anything new." *Id.* at 311. *See also Phillips v. Money,* 503 F.2d 990 (7th Cir. 1974); *Fletcher v. Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir. 1974); *Parks v. Ford, supra* at 30-31; *Boland v. Essex County Bank and Trust Co.,*[18] 361 F. Supp. 917 (D. Mass. 1973).

The question remains whether satisfaction of this "common law codification or alteration" test alone constitutes state involvement significant enough to be called state action. Judge Smith in *Jackson v. Statler Foundation, supra,* warned that "no

one factor is conclusive." By definition, if the facts here do not meet the state action standards for cases of racial discrimination such as *Statler Foundation,* they do not meet the more exigent prerequisites to state action in non-racial cases. The Fifth and Ninth circuits, in the context of challenges to self-help repossession statutes, have both found the common law test, alone, to be insufficient. In *Adams v. So. Cal. First National Bank, supra,* the Ninth Circuit stated:

> [W]e do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.,* that a secured party upon default had a right to take possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983.

492 F.2d at 330. The Fifth Circuit in *James Pinnex, supra,* noted:

> . . . the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it except when the contract is silent on the point. Thus the creditor's arguments that § 9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.

495 F.2d at 498. The court then went on to conclude, however, "No bright lines can be drawn in this area, and we draw none. Some state involvement . . . may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action."

Given the Second Circuit's discussions in *Shirley* and *Bond,* as well as relevant decisions from other courts, it seems clear to this court that with respect to those members of plaintiffs' "class" whose contracts contained a sale-in-case-of-default provision, there is no state action. See note 17 *supra.* As the Ninth Circuit noted in *Adams,* "the State cannot be held responsible for creating conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property." 492 F.2d at 333. See Note — State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656 at 665 (1974). Indeed, one case which has dealt specifically with § 7-210 and a contractual provision for sale has so ruled. *Smith v. Bekins Moving and Storage Co.,* 384 F. Supp. 1261 (E.D. Pa. 1974). Furthermore, here as in *Shirley* and *Bond,* the codification and alteration of common law also impose certain procedural restraints on it, to the benefit of warehouse customers, *i.e.,* requirements as to fair notice, reasonable sale, etc., and thus, as in those cases, represent ameliatory rather than regressive action. "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." *Jackson v. Statler Foundation, supra* at 639.

Likewise, with respect to those in plaintiffs' "class" who are subject to no contractual provision of sale, the court also fails to find sufficient state involvement to constitute state action. It is true that for this group of warehouse customers the defendants' power of sale comes only from § 7-210. However, in its decision in *Jackson v. Metropolitan Edison Co., supra,* the Supreme

Court stated: "Approval by a state utility commission . . . , where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" *Id.* at 357 (emphasis added). In this case no less than in Jackson, the state's involvement in the challenged activity is merely permissive. For this reason, and for the reasons detailed above, the court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28 U.S.C. § 1343(3), or to state a claim under 42 U.S.C. § 1983. The action is therefore dismissed.

SO ORDERED.

Dated: New York, New York

July 7, 1975

U. S. D. J.

NOTES

1. For the allegations of these named plaintiffs see the decision on Jones' motion to intervene by the Honorable Murray Gurfein, then U.S.D.J., at 63 F.R.D. 409, 411-12 (S.D.N.Y. 1974).

2. Verified Complaint at 2.

3. Section 1983 reads:

   > Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

   Federal district courts have jurisdiction to hear actions under § 1983 by virtue of 28 U.S.C. § 1343 (3).

4. Verified Complaint at 3.

5. Prior to codification by the U.C.C. and its predecessors, such a lien existed at common law. R. Brown, The Law of Personal Property § 119 (2d ed. 1955).

6. Such a right of enforcement did not exist in New York at common law, although it has existed in statutory form since 1879. See note 17, *infra.*

7. The "state action" and "action under color of state law" concepts have been found to be functionally equivalent. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970). Hereinafter they shall be jointly referred to as "state action."

8. The statutes challenged in *Hernandez* are substantially similar to those in question here. *Compare,* New York Lien Law §§ 184, 201, 202 and 204 with New York U.C.C. §§ 7-209, and 210.

9. In a footnote, however, Judge Costantino noted that the presence of state action "would seem to be quite manifest." "Though he is a private individual, the lienor through the public auctioneer it has retained, is performing a traditionally public function pursuant to a right accorded it by a state statute." 346 F. Supp. 313 at 317.

10. Judges Timbers and Lumbard, in a concurring opinion, went further than Judge Wyzanski in the court's opinion, stating that they would direct the district court to declare the sale provisions unconstitutional as applied if plaintiff were to prove his allegations.

11. In *Tucker v. Maher,* 497 F. 2d 1309 (2d Cir. 1974) Judge Mulligan noted:

> Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.

In a footnote he then added:

> In *Shirley v. State Nat'l Bank,* 493 F.2d 739 (2d Cir. 1974), and *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974), after both panels had split 2-1 over state action issues, rehearings en banc were denied . . . by votes of 5-3. In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), again a state action case, a rehearing en banc was also denied by a failure of a majority of the active judges to vote in favor of such reconsideration; the vote was 4-4, 496 F.2d at 636.

Id. at 1315.

12. Although the *Jackson v. Statler Foundation* factors were enumerated in the context of an action against charitable foundations for alleged racial discrimination, and the courts have traditionally used a lesser state action standard where race is concerned (see page 9, *infra*), they are helpful in delimiting the outer boundaries of state action prerequisites. The court in *Statler Foundation* found that if the defendant institutions were substantially dependent upon their tax-exempt status, if the government's regulatory scheme was both detailed and intrusive, if the scheme carried connotations of government approval, if the institutions did not have a substantial constitutional claim to be left alone, and if they served some public function *then* the district court on remand could find state action.

13. Ever since its statutory creation in 1879 (L. 1879 c. 336), the warehouseman's lien has traditionally been enforced by warehousemen themselves.

14. Even if this court were to conclude, however, that enforcement of a lien pursuant to § 7-210 constitutes execution of a public function, this conclusion would not lead inexorably to a finding of state action. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974); *Powe v. Miles,* 407 F.2d 73, 80 (2d Cir. 1968).

15. In *Jackson v. Metropolitan Edison Co., supra,* the Supreme Court described the Burton case as follows:

> . . . where a private lessee who practiced racial discrimination leased space for a restaurant from a state parking authority in a publicly owned building the Court held that the State had so far insinuated

itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.* at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. 419 U.S. at 357-58.

16. Our circuit has long recognized a double 'state action' standard, a less onerous test for cases involving racial discrimination, and a more riguous standard for other claims. *See United States v. Wiseman,* 445 F.2d 792, 795 at n.3 (2d Cir. 1971).

17. The statutory right to enforce the w[illegible]useman's lien, first enacted in 1879, was reenacted as [illegible] of the New York General Business Law in 1907. L. 1907, c. 732 § 33, as amended L. 1949, c. 588. In 1962 the state legislature again reenacted it, this time as part of the U.C.C., effective since 1964. The state courts have traditionally considered these statutory provisions to be in derogation of common law. *See, e.g.: Maritime World Corp. v. Grefe Steel Warehouse Corp.,* 154 N.Y.S. 2d 684 (S. Ct. N.Y. Cnty 1956); *Hackett v. Nelson Express & Storage Co.,* 294 N.Y.S. 905 (S. Ct. N.Y. Cnty 1937). To the extent, however, that contractual provisions between warehousemen and customers allowing for sale in case of default have been enforced by the courts, sale provisions of contractual origin can be said to be part of the state's common law. *Cf.* note 18, *infra.* A majority of warehouseman contracts in New York apparently contain such provisions.

18. In *Boland,* the court examined the constitutional validity of the Massachusetts self-help repossession statute. It found that at common law repossession was allowed *only if*

provided for by contract, whereas the statute in question allowed repossession *unless* it was *prohibited* by contract. In dicta the court asserted that the same differences had existed in *Shirley v. State National Bank, supra,* between the common and statutory law of Connecticut, adding: ". . . there is no indication in the [Second Circuit] court's ruling in *Shirley v. State National Bank* that the parties undertook to demonstrate to the court the changes in the law of Connecticut brought about by its enactment of the U.C.C." *Id.* at 921. The *Boland* court found that state action existed.

19. The court notes that a challenge to §§ 7-209 and 7-210 has already been mounted in the state courts. In *Jones v. Banner Moving and Storage Inc.,* 358 N.Y.S.2d 885 (Kings Cnty 1974), the New York Supreme Court found those statutes to be unconstitutional for essentially the same reasons plaintiffs would present here. That decision has been argued on appeal to the Appellate Division, 2d Dept., and is now *sub judice.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, amend. XIV, §1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.Y.U.C.C. 7-210:

"*Enforcement of Warehouseman's Lien*

* * *

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that

time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale."

42 U.S.C. §1983:

"*Civil Action for Deprivation of Rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1343:

"*Civil Rights and Elective Franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

77-37

77-42

77-25

Supreme Court, U. S.
FILED
JUL 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

v.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated, and WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents.

MEMORANDUM OF RESPONDENTS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK IN RESPONSE TO AND IN SUPPORT OF THE THREE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED HEREIN

ARNOLD H. SHAW
Attorney for Respondents, Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976.

NO.

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated, and WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents.

MEMORANDUM OF RESPONDENTS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK (HEREINAFTER REFERRED TO AS "THE RESPONDENT ASSOCIATIONS") IN RESPONSE TO, AND IN SUPPORT OF THE SEVERAL PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED HEREIN AS MORE PARTICULARLY HEREINAFTER SET FORTH.

BACKGROUND.

Three petitions have been filed for a writ of certiorari. One petition was filed by defendants Flagg Brothers, Inc. and Henry Flagg, another petition was filed by intervening defendants, American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. and still another petition was filed by intervening defendant, the Hon. Louis J. Lefkowitz, Attorney General of the State of New York (not necessarily in that order). The Respondent Associations are intervening defendants and appellees in the Court of Appeals proceeding below and although they are vitally interested in and concerned with these petitions and the relief sought thereby, they have, in the interests of avoiding needless and burdensome repetition, chosen not to file yet another petition but instead, to manifest their position by filing this memorandum in accordance with the last sentence of Supreme Court Rule 21 Subdivision 4 which states: "All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, *except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.*" (Emphasis added.)

OPINIONS BELOW.

For the aforesaid reasons of avoiding duplication, the Respondent Associations have refrained from including an appendix inasmuch as the opinions below both of the United States Court of Appeals and of the United States District Court for the Southern District of New York are set forth in the appendices of the petitions filed by the petitioners Flagg, et al. and the Attorney General of the State of New York.

QUESTION PRESENTED.

Does a warehouseman's exercise of nonjudicial sale to enforce his lien in a manner specified by State statute, Uniform Commercial Code (U.C.C.) Section 7-210, *Subdivision 2* constitute action "under color of State Law" within the meaning of 42 U.S.C. Section 1983 or State action under the Fourteenth Amendment? The question as thus propounded is substantially the same as the question as articulated by the Attorney General in his petition except that he made reference merely to Section 7-210, U.C.C. and failed to specify Subdivision 2. Similarly, in the petition filed by The American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc., the first question framed (p. 4) omitted to specify that only Section 7-210, *Subdivision 2* is at issue. Only in the petition of Flagg Brothers, Inc. and ano. (p. 2), at least in the first question propounded, is Subdivision 2 of Section 7-210, U.C.C. expressed. However, in the second question therein propounded, the petitioners have again fallen into error in referring, generally, to "The warehouseman's right of lien sale under the Uniform Commercial Code" without stating that only one type of lien sale is involved - that prescribed in Section 7-210, *Subdivision 2,* U.C.C.

REASONS FOR GRANTING WRIT.

The Respondent Associations subscribe to the points urged by the petitioners, The American Warehousemen's Association, and ano. at pp. 7 to 10, inclusive, of their petition with the following comment: In point I of the aforesaid petition the conflict between the decision below and that of the United States Court of Appeals for the Ninth Circuit in *Melara vs. Kennedy*, 541 Fed. 2nd 802 is mentioned. This conflict has been aggravated by the decision of *Cox vs. Timm,* Uni-

ted States Court of Appeals for the Eighth Circuit, decided May 12, 1977 ___ Fed. 2nd ____, 45 U.S.L.W. 2575 in which the element of "state action" was found thus, at least ostensibly, supporting the decision of the Second Circuit below.

The Respondent Warehouses do not agree with the manner in which point II of the aforesaid petition is stated (p. 8). Neither the warehouseman's lien per se (Section 7-209, Uniform Commercial Code) nor the method of enforcement of a warehouseman's lien confined to commercial warehousemen (as distinguished from warehousemen who store household furnishings and the like) by virtue of Section 7-210 (1) of the Uniform Commercial Code has been constitutionally challenged below. It is only with respect to the method of enforcement available to all classifications of public warehousemen set forth in Section 7-210, *Subdivision 2,* Uniform Commercial Code, that constitutionality has been challenged. The Respondent Associations, however, do agree with the proposition that this second method of enforcement at issue is of vital importance to commercial warehousemen as well as household furnishings warehouses, and that an invalidation of this procedure can well impede the flow of commerce.

In addition, the section at issue, Section 7-210 (2), U.C.C., is a statute of national significance and consequence inasmuch as it has been enacted in fifty states and the District of Columbia.

CONCLUSION.

The several petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted on the grounds that:

(a) Decisions of three Courts of Appeals

are in conflict on the same matter; and

(b) The Court of Appeals for the Second Circuit has not only decided an important question of Federal law under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983, but one that involves the Uniform Commercial Code, a statute that is in effect in all fifty states and in the District of Columbia, and is, therefore, a statute of national significance.

Respectfully submitted,

ARNOLD H. SHAW,
Attorney for Respondents, Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York.

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Of Counsel.

FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., etc., *et al.*,
Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,
Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitions for Writs of Certiorari Filed
July 5 and 6, 1977
Certiorari Granted October 3, 1977

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Date	Proceedings
9-21-73	Filed verified complaint and issued summons.
12-14-73	Filed plaintiffs' interrogatories.
1-25-74	Filed defendant Henry Flagg's answers to plaintiffs' interrogatories.
2-8-74	Filed affidavit and notice of motion of Louis J. Lefkowitz for permission to intervene as defendant.
2-8-74	Filed answer of Louis J. Lefkowitz.
4-10-74	Filed answer of defendants Flagg Brothers, Inc. and Henry Flagg.
4-19-74	Filed notice of motion and motion for leave to intervene as defendants.
4-19-74	Filed answer of American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc., proposed intervenor defendants.
4-26-74	Filed defendants' affidavit in opposition to motion for intervention by Gloria Jones.
6-26-74	Filed affidavit and notice of motion to permit Warehousemen's Association of the Port of New

Relevant District Court Docket Entries—73 Civ. 4050

York, Inc. and The Cold Storage Warehousemen's Association of the Port of New York to intervene as defendants.

6-26-74 Filed answer of proposed intervenor defendants.

6-26-74 Filed plaintiffs' affidavit in opposition to motions for intervention by proposed association intervenors.

6-26-74 Filed notice of motion for an order permitting Gloria Jones to intervene.

6-26-74 Filed proposed intervenor's complaint.

6-26-74 Filed intervenor Gloria Jones' reply affidavit in support of motion to intervene.

6-26-74 Filed opinion #40873 . . . The four motions to intervene as party defendant are granted; the State Attorney General of the State of New York is permitted to intervene on consent. Further caption in the action shall include the names of the intervening parties. Plaintiff Brooks has no claim for injunctive relief but only a claim for damages and declaratory relief. It is so ordered. — Gurfein, J.

8-20-74 Filed stipulation and order that the proposed intervenor's complaint of Gloria Jones, as annexed to her motion to intervene in this action, is hereby deemed to be her actual complaint. . . . So ordered.— Gurfein, J.

10-7-74 Filed defendant Flagg Brothers, Inc.'s and Henry Flagg's affidavit and notice of cross-motion to dismiss complaint.

Relevant District Court Docket Entries—73 Civ. 4050

10-7-74 Filed memorandum of defendants Flagg Brothers, Inc. and Henry Flagg in support of cross-motion to dismiss and in opposition to plaintiffs' motion for summary judgment and class action determination.

10-9-74 Filed memorandum of law of Attorney General in defense of constitutionality.

11-6-74 Filed defendants Flagg Brothers, Inc.'s and Henry Flagg's reply memorandum of law in support of cross-motion to dismiss.

6-17-75 Filed supplemental memorandum of law of Attorney General.

7-7-75 Filed plaintiffs' memorandum of law in opposition to cross-motion to dismiss complaint.

7-7-75 Filed plaintiffs' affidavits and notice of motion for class action determination and summary judgment.

7-7-75 Filed plaintiffs' memorandum of law in support of motion for class action determination and summary judgment.

7-7-75 Filed defendant-intervenor AWA's and IARW's affidavits and memorandum of law in opposition to plaintiffs' motions.

7-7-75 Filed affidavit of defendant-intervenors Warehousemen's Association of the Port of New York, Inc. and The Cold Storage Warehousemen's Association of the Port of New York.

Relevant District Court Docket Entries—73 Civ. 4050

7-7-75	Filed Opinion #42742 . . . Plaintiffs' motion for class action determination and for summary judgment is denied. Defendant's motion to dismiss for lack of jurisdiction is granted. Plaintiffs' action is dismissed for lack of jurisdiction. Plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28:1343(3), or to state a claim under 42:1983. The action is, therefore, dismissed. So ordered. — Werker, J. m/n
7-7-75	Filed memorandum endorsed on plaintiffs' motion for class action determination and summary judgment filed 7-7-75: Motion denied. Complaint dismissed. See opinion #42742. So ordered. — Werker, J. m/n
7-7-75	Filed memorandum endorsed on defendants' cross-motion to dismiss filed 10-7-74: Motion granted. See opinion #42742. So ordered. — Werker, J. m/n
7-7-75	Filed plaintiffs' notice of appeal to the Second Circuit from order denying plaintiffs' motion for class action determination and summary judgment and granting cross-motion to dismiss complaint.

RELEVANT COURT OF APPEALS DOCKET ENTRIES—75-7437 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ***SHIRLEY HERRIOTT BROOKS, ET AL. v. FLAGG BROTHERS, INC., ET AL.,***

Dated	Proceedings
7-31-75	Filed copies of docket entries and notice of appeal.
9-12-75	Filed record (original papers of District Court).
10-31-75	Filed briefs of appellants-plaintiffs.
10-31-75	Filed joint appendix.
12-15-75	Filed briefs of appellees-defendants Flagg Brothers, Inc. and Henry Flagg; American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.; the Attorney General of the State of New York; Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York.
1-5-76	Filed reply brief of appellants-plaintiffs.
2-13-76	Argument heard by: Timbers, C.J., Holden, D.J., Bryan, D.J.
4-7-77	Filed opinion and judgment. District Court order reversed and case remanded. The combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law

remedies suffices to thrust the state's involvement in the challenged activity over the state action threshold. Per Bryan, D.J.

4-7-77 Filed separate opinion in dissent. The defendant warehouseman's exercise of the power of sale allowed by the Uniform Commercial Code is not state action. Per Holden, D.J.

7-12-77 Filed notices of filing of petition for writ of certiorari. Nos. 77-25, 77-37, 77-42.

VERIFIED COMPLAINT (CLASS ACTION)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4050

SHIRLEY HERRIOTT BROOKS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., and JAMES A. LEVISTER, individually and as City Marshall of the City of Mount Vernon, New York,

Defendants.

I.

PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §§1983 and 1985. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privileges and immunities secured by the United States Constitution without regard to the amount in controversy.

3. Jurisdiction is also conferred on this Court by 28 U.S.C. §1343 1(1), (3) and (4) which grants this Court jurisdiction over claims authorized by 42 U.S.C. §1985.

4. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §§1983 and 1985. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

III.

CLASS ACTION ALLEGATIONS

A. Plaintiff Class

5. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

6. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs without an opportunity to be heard, have acted and refused to act on grounds generally applicable to the class.

B. Defendant Class

7. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the

State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

8. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.

THE PARTIES

9. Plaintiff Shirley Herriott Brooks is a citizen of the United States and of the State of New York. Plaintiff resides at 120 North Kensico Avenue, White Plains, New York with her three children, George, Jr., age 12, Tonya, age 11 and Michael, age 10. Plaintiff's husband died in an automobile accident approximately one year ago. Plaintiff is employed as a nurse's aid by the Brooke Rehabilitation Center, White Plains, New York, for which her take home pay is approximately $100 per week. This is the sole source of income for plaintiff and her family.

Verified Complaint

10. Defendant Flagg Brothers, Inc. is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

11. Defendant Henry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

12. Defendant James A. Levister is the City Marshall of the City of Mount Vernon, New York. He is being sued individually and in his official capacity.

V.

FACTUAL ALLEGATIONS

13. In the spring of 1973, plaintiff and her family were residing at 33 North 3rd Avenue, Mount Vernon, New York. Pursuant to an order of eviction that had been entered against plaintiff by the City Court of Mount Vernon, defendant Levister, City Marshall of the City of Mount Vernon, appeared on June 13, 1973 to remove plaintiff and her possessions from her apartment.

14. When defendant Levister appeared to remove plaintiff and her possessions from her apartment on June 13, 1973, plaintiff informed defendant Levister that she wanted to call someone to store her furniture and other household possessions. Defendant Levister informed plaintiff that she couldn't get anyone to store her furniture and that the man with him, defendant Flagg, was the man who would store her furniture. Plaintiff was led to believe by defendant Levister's comments that she had no choice but to let defendant Flagg store her goods.

Verified Complaint

15. Defendant Flagg informed plaintiff that plaintiff would have to pay $65 per month for the moving and storage of the furniture. Plaintiff informed defendant Flagg that this sounded like a high price, but believing that she had no choice in the matter, told defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

16. After plaintiff's goods were loaded on one of the defendant Flagg Brothers' trucks, one of Flagg Brothers' moving men told plaintiff that she would have to pay $178. Plaintiff protested, since she had been led to believe that $65 was the entire cost. The moving man explained that she would have to pay $75 per month for storage, $75 for barrelling and platforming and $28 for fumigating, for a total of $178. Plaintiff inquired whether she had to have fumigating and the moving man responded that fumigating was required. After first insisting on payment in cash, defendant Flagg agreed to accept plaintiff's check for $178.

17. After plaintiff was evicted, she and her children moved into her cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

18. On or about June 15, 1973, plaintiff called defendant Flagg Brothers in order to find out how long defendant Flagg Brothers would store plaintiff's goods for her $178 payment. An employee of defendant Flagg Brothers informed plaintiff that she owed defendant Flagg Brothers an additional $156.

19. On or about June 19, 1973, plaintiff went to the office of defendant Flagg Brothers. Plaintiff was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the $178 payment as a "deposit" and that there was a "balance due" of $156. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". Plaintiff informed defendant Henry Flagg

that the prices were unreasonable and that plaintiff couldn't pay them. Defendant Henry Flagg informed plaintiff that on the first of July, 1973, plaintiff would owe an additional $75 for storage for the month of July. Plaintiff told defendant Henry Flagg that her storage on June 13, 1973 should run to July 13, 1973. Defendant Henry Flagg informed plaintiff that even if her goods had been stored on June 29, 1973, the storage charges are on a "per month" basis and that an additional $75 would be due by July 1, 1973.

20. On or about June 29, 1973, plaintiff made a telephone call to defendant Henry Flagg. Defendant Flagg offered to let plaintiff remove her goods by July 13, 1973 if plaintiff would pay the balance of the original bill allegedly due ($156) plus $45. Plaintiff informed Mr. Flagg that her original payment should cover the storage of the goods from June 13, 1973 to July 13, 1973. Plaintiff was unable to remove her goods by July 13, 1973 because she was sharing an apartment with her cousin and there was, at this time, insufficient space in the apartment for her goods.

21. Approximately one week later, in early July, 1973, plaintiff called defendant Henry Flagg for a delivery date for her goods. Mr. Flagg's secretary gave plaintiff a date of August 14, 1973. Defendant Flagg Brothers' secretary told plaintiff that plaintiff could only obtain her possessions if she paid $484 in cash, which amount included the past balance allegedly due. Defendant Henry Flagg told plaintiff that payment had to be in cash and that Flagg Brothers does not accept checks or money orders.

22. On or about August 25, 1973, plaintiff received a letter dated August 22, 1973 from defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, has [sic] (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from
>
> | | | |
> |---|---|---|
> | Moving due | $156.00 | |
> | Storage for 7/73 & 8/73 | 150.00 | at $75.00 a month |
> | Total Bal. | $306.00" | |

A copy of this letter is annexed hereto as Exhibit "B". Accompanying this letter from defendant Flagg Brothers was a "Final Notice" noted August 22, 1973 informing plaintiff that unless payment on her storage account was made, defendant Flagg Brothers would advertise her goods for public auction. A copy of this Notice is annexed hereto as Exhibit "C".

23. On August 24, 1973, plaintiff wrote to defendant Flagg Brothers detailing her position and claims regarding defendant Flagg's billing computations and methods. A copy of this letter is annexed hereto as Exhibit "D".

24. On August 23, 1973, plaintiff's attorney wrote to defendant Flagg Brothers contesting defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed hereto as Exhibit "E". A copy of defendant's response to this letter is annexed hereto as Exhibit "F".

25. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued detention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed

hereto as Exhibit "G". Defendants have threatened to sell these goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity to be heard. The sale of these goods without a prior hearing will cause plaintiff and her family further grave and irreparable injury in that the goods being held by defendant Flagg Brothers constitute essential items of household furniture which plaintiff, because of her limited income of approximately $100 per week, cannot afford to replace.

26. On information and belief, a conspiracy agreement, or understanding exists between defendants Levister, Henry Flagg and Flagg Brothers pursuant to which defendant Levister notifies defendant Henry Flagg or other officer or employee of Flagg Brothers, Inc. that an eviction is to take place to enable defendant Flagg Brothers to obtain the contract for the moving and storage of the evicted tenant's goods. The source of this allegation are the facts alleged in paragraphs 14 and 15, *supra*.

27. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.

LEGAL CLAIMS

28. Defendants imposition of a lien on plaintiffs' goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause

of the Fourteenth Amendment to the United States Constitution.

29. New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

30. New York Uniform Commercial Code §§209 and 210 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that these statutes have the effect of irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in a subsequent legal proceeding, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

31. The conspiracy, agreement or understanding set forth in paragraphs 25, *supra* violates 42 U.S.C. §§1983 and 1985 and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution in that it denied and continues to deny plaintiff and all others similarly situated of their property without due process of law.

WHEREFORE, plaintiffs respectfully pray on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees,

agents and successors from encumbering plaintiffs' goods and selling these goods without affording plaintiff an opportunity to be heard.

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees, agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

(d) Enjoining defendants, their officers, employees, agents and successors from conspiring, agreeing or otherwise acting jointly and in concert as described in paragraph 26 herein.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-209 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter a final judgment declaring the conspiracy, agreement or understanding set forth in paragraph 26 herein in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1983 and 1985.

4. Enter a final judgment awarding plaintiff $5,000 actual and nominal damages against the defendants jointly and severally.

5. Enter a final judgment awarding plaintiffs $20,000 punitive damages against defendants, jointly and severally.

6. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

7. Award plaintiffs their costs, disbursements and attorneys' fees.

8. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: September 21, 1973
White Plains, New York

Respectfully submitted,

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

(Verified by Shirley Herriott Brooks on September 20, 1973)

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EXHIBITS TO COMPLAINT

Combined Uniform Household Goods bill of Lading and Freight bill — New York Commercial Zone.

FLAGG BROS. INC., MOVING & STORAGE

N.Y.C.—M.T. No. 826 | 247 SO. FIFTH AVENUE | MT. VERNON, N. Y. 10550 | 914-668-9261 – 212-324-5466

Can't Read Initials Pd. in Cash - 4 Cartons per Attorney - Book - Mat...

NAME Shirley Brooks Stone Tel.

FROM 33 N. Third Ave. Apt.
Mt. Vernon, N.Y.

TO Storage Apt.

OTHER STOPS

MOVING DATE 6/13/73 DAY Wed. TIME A.M. P.M.

TIME RECORD

Start A.M. P.M. Customer Initials

Finish A.M. P.M. Customer Initials

JOB HOURS 6

TRAVEL TIME ½

TOTAL HOURS 6½

MOVING RATE: VANS MEN @ $ Per Job Hr., Plus Hrs. Travel Time

ESTIMATE OR REMARKS

(Approx. estimate—packing date—Instructions on job—or other info.)

VALUATION

Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 ( ) cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT

(SIGN BEFORE START OF ANY SERVICE)

The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Shirley Brooks

By:

MOVER: FLAGG BROS. INC., MOVING & STORAGE

By:

DELIVERY RECEIPT

Except as specifically endorsed hereon
All services and All articles received in Good Condition

CUSTOMER: Shirley Brooks

By:

RATES and DESCRIPTION	CHARGES
MOVING 6 hours @ $ 28.00 per hr.	168.00
OVERTIME ____ hours @ $ ____ per hr.	
CARTAGE ____ cu. ft. @ $ ____ per cu. ft.	
WEIGHT ____ lbs. @ $ ____ per lb.	
PIANO CHGS.	
OTHER Travel Time	14.00
____ Barrels, packed ____ @ $ ____ each	
15 Barrels, loaned ____ @ $ 2.00 each	30.00
____ Wardrobes ____ @ $ 4.00 each	
6 Book Cartons or boxes ____ @ $ 1.50 each	9.00
5 Matt Cartons ____ @ $ 6.00 each	30.00
Other Fumigating	3.00
Whse. Labor chgs.	
Storage chgs. A month	75.00
Other	
Insurance; shipper declares the full value of the shipment for the purpose of insurance to be: Amt. $ ____ @ $ ____ per $100.00	
TOTAL CHARGES	334.00
Advance Deposit	178.00
BALANCE DUE	156.00

RECEIVED PAYMENT

MOVER FLAGG BROS. INC., MOVING & STORAGE

By

CUSTOMER'S BILL & RECEIPT TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.
(For Customer When Job Is Completed)

FORM 252A MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

EXHIBIT A — BILL OF LADING: TERMS AND CONDITIONS

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

EXCEPTIONS TO ABOVE LIABILITY FOR MECHANICAL, ELECTRICAL OR OTHER OPERATION OR FUNCTIONING, DELAYS, QUARANTINE, STORAGE-IN-TRANSIT OR CONTENTS OF PIECES OR CONTAINERS.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the acts of public authority, quarantine, riots, strikes, perils of navigation, the act or default of the shipper or owner, the nature of the property or defect or inherent vice therein. Except in case of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for the loss or damage thereto or responsible for its condition, operation or functioning, whether or not such property or any part of it is packed, unpacked, or packed and unpacked by the shipper or its agent or the carrier or its agent. Except in cases of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for damage to or loss of contents of pieces of furniture, crates, bundles, cartons, boxes, barrels or similar containers unless such contents are open for the carrier's inspection and then only for such articles as are specifically listed by the shipper and receipted for by the carrier or its agent.

(c) Except in cases of negligence of the carrier or party in possession, the carrier or party in possession of any of the property herein described shall not be liable for delay caused by highway obstruction, or faulty or impassable highway, or lack of capacity of any highway, bridge, or ferry, or caused by breakdown or mechanical defect of vehicles or equipment.

(d) Except in case of negligence of the carrier or party in possession the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held or stored in transit upon request of the shipper, owner, or party entitled to make such request, whether such request was made before or after the carrier comes into possession of the property.

(e) In case of quarantine the property may be discharged at the risk and expense of the owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, and in such case, carrier's responsibility shall cease when the property is so discharged, or property may be returned by carrier at owner's expense to shipping point earning charges both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occassioned by fumigation or disinfection or other acts done or required by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detension, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

CLAIMS PROCEDURE AND LIMITATIONS

Sec. 2. (a) No carrier is bound to transport said property by any particular schedule, vehicle, train or vessel or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier in possession of the property when the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time, for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property so far as this shall not avoid the policies or contracts of insurance; provided that the carrier reimburse the claimant for the premium paid thereon.

(d) Any claim for loss, damage or overcharge whether made by the consignee, consignor or a third party beneficiary, shall be in writing and shall be accompanied by original paid Bill for transportation and original Bill of Lading, if not previously surrendered to carrier. Carrier may require certified or sworn statement of claim.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage, packing and repacking at owner's cost.

Sec. 4. (a) Property not received by the party entitled to receive it within the free time (if any) allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, at the time tender of delivery of the property to the party entitled to receive it or at the address given for delivery has been made, may be kept in vehicle, warehouse or place of business of the carrier, subject to the tariff charge for storage and carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a warehouse at the point of delivery or at other available points, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all transportation and other lawful charges, including a reasonable charge for storage. In the event the consignee can not be found at the address given for delivery, then in that event, notice of the placing of such goods in warehouse shall be left at the address given for delivery and mailed to any other address given on the bill of lading for notification, showing the warehouse in which such property has been placed, subject to the provisions of this paragraph.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it upon tender of delivery, or said consignee or party entitled to receive it fails to receive it or claim within 15 days after notice of arrival of the property at destination shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier; provided, that the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published; provided, that 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported to destination is refused by consignee or party entitled to receive it, or consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: provided, that, if there be time for service of notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given in such manner as the exercise of the diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of advances, tariff charges, packing, storage, and any other lawful charges and the expense of notice, advertisement sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owners of the property sold hereunder.

(f) Where the carrier is directed to load property from (or render any services at) a place or places at which the consignor or his agent is not present, the property shall be at the risk of the owner before loading.

Where the carrier is directed to unload or deliver property (or render any services) at the place or places at which the consignee or its agent is not present, the property shall be at the risk of the owner after unloading or delivery.

ARTICLES OF EXTRAORDINARY VALUE, DOCUMENTS, SPECIE

Sec. 5. No Carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Explosives or dangerous goods will not be accepted for shipment. Every party whether principal or agents shipping such goods shall be liable for any indemnity the carrier against all loss or damage caused by such goods and carrier will not be liable for safe delivery of the shipment.

MOVER (CARRIER) WILL NOT RELINQUISH POSSESSION UNTIL ALL CHARGES ARE PAID

Sec. 7. The owner or consignee shall pay the advances, tariff charges, packing and storage, if any, and all other lawful charges on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the advances, tariff charges, packing charges, storage and all other lawful charges, except that if the consignor stipulates, by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has not beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, in the case of a shipment reconsigned or deverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require, at time of shipment, the prepayment of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the advances or tariff charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election for common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

ALL CLAIMS, DISPUTES, OR CONTROVERSIES ARE SUBJECT TO ARBITRATION

Sec. 10. Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected hereby, whether such claim be founded in tort or contract, shall be settled by arbitration under the Arbitration Law of the State of New York, and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

EXHIBIT B — H. FLAGG'S LETTER OF AUGUST 22, 1973

MEMO LETTER

FLAGG BROS. TRUCKING SERV., INC.
247 SO. FIFTH AVENUE — MOUNT VERNON, N.Y. 10550

Phone 668-9261

MESSAGE

To
Ms. Shirley Stone Brooks

Dated 8/22/73

Dear Ms. Stone:

Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold.

Your previous bal. from Moving due	156.00	
storage for 7/73 & 8/73	150.00	@$75.00 a month
Total Due	306.00	

Signed Respectfully your, s/ Henry Flagg
H. Flagg, Pres.

EXHIBIT C — FINAL NOTICE

FINAL NOTICE

FLAGG BROS. INC., MOVING and STORAGE
41 EAST 3rd ST. MT. VERNON, N.Y. 10550
Phone: (914) 668-9261 and (212) 324-5466

August 22, 1973

Exhibit C

Shirley Brook Stone c/o M. Robinson
40 E. Sidney Ave.
Mt. Vernon, N.Y.

Dear Ms. Stone,

Your Storage Account, amounting to $150.00 is now seriously overdue, and we herewith request that you make a payment on same on or before Sept. 1, 1973.

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours, H. Flagg, Pres.
FLAGG BROS. INC.,
MOVING and STORAGE

EXHIBIT D — PLAINTIFF'S LETTER OF AUGUST 24, 1973

40 E. Sidney Ave.
Mt. Vernon, N.Y. 10550
Aug. 24, 1973

Flagg Brothers
41 E. 3rd St.
Mount Vernon, N.Y. 10550

Dear Sir

As per previous conversations via telephone and being repetitious I must try one last time.

I informed you of your prices and how it was almost impossible to pay.

When you came to my apt. to put my furniture in storage

Exhibit D

you informed me that storage would be sixty-five dollars; after putting all my furniture in your van one of your employees informed me of a new price as follows:

$75.00/ month storage
75.00 for platforming and barreling
28.00 for fumigating.

I gave a check for what I believed at the time was for a payment in full. The beginning of the next week I wanted to know how long this money would be good for. Your secretary informed me that I owed another $156.00. When asked why I was informed that there were other things I had to pay for boxes etc. Also I was informed to come in. When I came to the office the story again was different from that of the original and the second conversation. I wanted to know where my furniture was stored and wanted to see it, I again was informed there was a fee of thirty five dollars to see also my furniture was in Harrison. Since then there has been numerous telephone calls and still different prices quoted.

I didn't wish to cause trouble but you are making it very difficult for me so as a last resort I'm letting you know my intentions. You and I both know your prices are atroshish [sic] for storage etc. I have checked into this area thoroughly and know you do not charge by the hour to pick up and store furniture. This is something which is done by the amount of cubic feet.

It would be advisable for me to hear from you by return mail as to the amount of cubic feet of furniture and also for you to do something price wise since the first amount you gave me was to be the pd in full amt. $178.00. You also changed the storage price from $65 to $75 and quoted to me when I came to your office that "It's a shame you have to be a victim of circumstances even though its our fault."

Exhibit D

I expect an answer with in five days or/and I will have to take further action and have you investigated by the ICC and/or the PSC.

Thanking you in advance for letting me know something by mail with in five days.

Yours Truly
s/ Ms. S. Brooks

EXHIBIT E — LEGAL AID ATTORNEY'S LETTER OF AUGUST 23, 1973

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 GRAND STREET
WHITE PLAINS, NEW YORK 10601

(914) RO. 1-9200

August 23, 1973

Flagg Bros, Inc.
Moving & Storage
247 South 5th Ave.
Mt. Vernon, N.Y. 10550

Re: Shirley Helliott (Shirley Brooks Stone)
120 North Kensico Ave.
White Plains, N.Y.
(Formerly 33 N. Third Ave.)
(Mt. Vernon, N.Y.)

Gentlemen:

Mrs. Stone has consulted me regarding charges being made for furniture which she has stored with you. As I understand, she was originally given a storage charge of $75. a month as indicated by the enclosed copy of your "Combined Uniform Household Goods Bill of Lading and Freight Bill." However,

Exhibit E

she states that since June 13, 1973 the price seems to increase everyday and that the only explanation she has been able to obtain is something to the effect that you are sorry for the different prices, but you are just a victim of circumstances.

I would appreciate your explanation of this situation — looked at from the standpoint of dollars as well as from what you determine to be your legal rights in order that I may be able to advise her further.

Very truly yours,

s/ John G. Kelly
John G. Kelly
Attorney

JGK/ea

EXHIBIT F — H. FLAGG'S LETTER OF AUGUST 30, 1973

FLAGG BROS., INC. MOVING AND STORAGE
247 SOUTH 5th AVE. MOUNT VERNON, N.Y.
914 668-9261
212-324-5466

August 30, 1973

The Legal Aid Society of Westchester 'County
56 Grand Street
White Plains, New York 10601

RE: Shirley Brooks Stone
120 N. Kensico Ave.
White Plains, N.Y.
Formerly 33 N. 3rd Ave.
Mt. Vernon, N.Y.

Dear Sir:

As we explain over the telephone, our rates are by the hour. For one (1) truck, three (3) men, we get $32.00 an hour plus ½ travel time. As far as your Bill of Lading is concerned, because

Exhibit F

of the circumstances and the hardship we were concerned at the time, we charged for 3 men and a truck for 6 hours @$28.00 an hour $168.00
plus ½ hour travel time which was 14.00
She used 15 Barrels @$2.00 ea. 30.00
6 Book ctns @1.50 ea. 9.00
5 Matt. Ctns @6.00 ea. 30.00
As standard procedure - Fumigating 8.00

I'm sorry we do not charge by cubic feet and as far as storage is concerned, we charge by the containers which is $25.00 per container per month. Ms. Stone gave $178.00 as a deposit which left a balance due on the original bill of $156.00.

Coming out of storage; you're charges again are by the hour for one (1) truck, three (3) men, @ $32.00 an hour. Charges coming out of storage estimated to be 5½ hours ½ travel time @ $32.00 an hour which these charges brings a total of . $176.00
7/73, 8/73 Storage due 150.00
Balance from old bill 156.00
$482.00

We must be paid in cash upon delivery before the furniture is unloaded from the truck.

Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings.

Respectfully yours,

s/ Henry Flagg
Henry Flagg, President
FLAGG BROS., INC.
MOVING & STORAGE

HF/mgd
cc: Ms. Shirley Stone Brooks

CONTRACTOR OR CARRIER

HOUSEHOLD GOODS DESCRIPTIVE INVENTORY

AGENT Flagg

CARRIER'S REFERENCE NO.

CONTRACT OR GBL. NO.

OWNER'S GRADE OR RATING AND NAME Shirley Brooks Stone

ORIGIN LOADING ADDRESS 33 N. 3rd Ave. Mt. Vernon, N.Y CITY STATE

GOVT. SERVICE ORDER NO.

DESTINATION Thorn's (3 Boxes)

VAN NUMBER

EXCEPTION SYMBOLS

BE-BENT
BR-BROKEN
BU-BURNED
CH-CHIPPED
CU-CONTENTS & CONDITION UNKNOWN
D-DENTED
F-FADED
G-GOUGED
L-LOOSE
M-MARRED
MI-MILDEW
MO-MOTHEATEN
PBC-PACKED BY CARRIER
PBO-PACKED BY OWNER
R-RUBBED
RU-RUSTED
SC-SCRATCHED
SH-SHORT
SO-SOILED
T-TORN
W-BADLY WORN
Z-CRACKED

LOCATION SYMBOLS

1. ARM
2. BOTTOM
3. CORNER
4. FRONT
5. LEFT
6. LEGS
7. REAR
8. RIGHT
9. SIDE
10. TOP
11. VENEER

NOTE: *The omission of these symbols indicates good condition except for normal wear.*

ITEM NO.	CR REF	ARTICLES	CONDITION AT ORIGIN	EXCEPTIONS IF ANY AT DESTINATION
1				
2	2			
3				
4	1			
5				
6	1			
7				
8			✓	
9				
0				
1	1			
2	1			
3				
4				
5	1			
6	1			
7	1			
8	2			
9	2			
0	1			
1	6			
2	2			
3	1			
4	2			
5				
6	2			
7	1			
8				
9				
0				

ITEM NO. REMARKS/EXCEPTIONS

"We have checked all the items listed and numbered 1 to____ inclusive and acknowledge that this is a true and complete list of the goods tendered and of the state of the goods received."

INVENTORY NUMBER

AT ORIGIN	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE	AT DESTINATION	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE
	OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE		OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE

EXHIBIT G — INVENTORY LIST

LIST OF ITEMS LISTED IN EXHIBIT G

3	Bedsprings	1	Iron bod.
2	Mattress	1	Shopping cart
2	Mirrors	2	Night stand
1	Dresser	3	Bed rail
2	Chest	1	Round table top
1	Sofabed	6	Book cartons cu
4	Kit. Chairs	2	Books cu
11	Barrels cu	1	Oven toy
3	Rugs	2	Bar stools
2	Padings		Table frames
1	Bar	2	Side chairs
1	Side Chair	1	High shelf
3	Room dividers		Sofa on rock
6	Trays		
1	Club chair		

AFFIDAVITS OF SERVICE OF SUMMONS AND VERIFIED COMPLAINT

(All affidavits and certificates of service of process filed in the proceedings in the district and circuit courts have been omitted in the printing of the Appendix.)

PLAINTIFFS' INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(Service list omitted)

Plaintiffs' Interrogatories

The plaintiffs in the above entitled action request that defendant, Henry Flagg, answer under oath the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure:

1. State the exact or approximate number of contracts for moving and storage entered into by Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known and is not reasonably ascertainable, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

2. State the exact or approximate number of "Final Notices" (Exhibit "C" to complaint herein) given to customers of Flagg Brothers, Inc. by Flagg Brothers, Inc. during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

3. State the exact or approximate number of sales pursuant to New York U.C.C. §7-210 to authorize the liens authorized by New York U.C.C. §7-209 made by defendant Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973.

PLEASE TAKE NOTICE, that a copy of the answer to the above interrogatories must be served upon the undersigned within 30 days after the service of these interrogatories.

Dated: December 13, 1973

s/ Gene F. Reibman
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
Attorneys for Plaintiffs

ANSWER TO INTERROGATORIES

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(Service list omitted)

The defendant HENRY FLAGG responding to the interrogatories of the plaintiff alleges as follows:

1. (a) In the year 1971, approximately 304 contracts for moving and approximately 43 contracts for storage were entered into by FLAGG BROTHERS, INC.

(b) In the year 1972, approximately 529 contracts for moving and approximately 70 contracts for storage were entered into by FLAGG BROTHERS, INC.

(c) In the year 1973, approximately 567 contracts for moving and approximately 70 contracts for storage were entered into by FLAGG BROTHERS, INC.

2. (a) In the year 1971 there were no "Final Notices" given to customers of FLAGG BROTHERS, INC.

(b) In the year 1972, there were no "Final Notices" given to customers of FLAGG BROTHERS, INC.

(c) In the year 1973, there were approximately 65 "Final Notices" given to customers of FLAGG BROTHERS, INC.

3. (a) In the year 1971, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

(b) In the year 1972, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

Answer to Interrogatories

(c) In the year 1973, there were approximately 18 sales.

Dated: New York, New York
January 14, 1974

s/ Alvin Altman
ALVIN ALTMAN
BRODSKY, LINETT
& ALTMAN
Attorneys for defendants
FLAGG BROTHERS, INC.
and
HENRY FLAGG

NOTICE OF MOTION TO INTERVENE: LOUIS J. LEFKOWITZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of A. SETH GREENWALD, sworn to February 6, 1974 the undersigned will make a motion for leave to intervene pursuant to Rule 24 of the F.R.C.P. at the United States Courthouse, Foley Square, New York, New York 10007 on the 22nd day of February, 1974 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order allowing the Attorney General of the State of New York to intervene in defense of the constitutionality of Uniform Commerical Code §§7-209, 7-210 and for such other and further relief as the court may deem just and proper.

Notice of Motion to Intervene: Louis J. Lefkowitz

Dated: New York, New York
February 6, 1974

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se
Proposed Intervenor

s/ A. Seth Greenwald
A. SETH GREENWALD
Assistant Attorney General

(Service list omitted)

AFFIDAVIT OF A. SETH GREENWALD IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General of the State of New York and make this affidavit in support of the Attorney General of the State of New York's motion to intervene.

Affidavit of A. Seth Greenwald in Support

The Attorney General under Executive Law §71 has an obligation to defend the constitutionality of the laws of the State of New York. This is similar to F.R.C.P. 24(c), on giving notice to the Attorney General of the United States. Pursuant to Rule 24(b). F.R.C.P., the Attorney General of the State of New York should be allowed to intervene because the defendants are expected to rely on a state statute, Uniform Commercial Code, §§7-209 and 7-210 as a defense. Executive Law §71 contemplates that only the Attorney General can adequately defend constitutionality of a state law. The defendants may assert compliance with U.C.C. §7-210 and therfore will be relying on a "state or . . . requirement or agreement issued or made pursuant to the statute . . . " F.R.C.P. 23(b). Permissive intervention is appropriate. See 3B Moore's Federal Practice §24.10[5] and cases cited therein.

I should also remind the court that none of the present parties have raised any objection to this motion.

WHEREFORE, your deponent respectfully requests that the motion to intervene be granted.

s/ A. Seth Greenwald
A. SETH GREENWALD

Sworn to February 6, 1974

ANSWER OF LOUIS J. LEFKOWITZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Intervenor herein, for his pleading in intervention alleges as follows:

Answer of Louis J. Lefkowitz

FIRST: That pursuant to Executive Law § 71 of McKinney's Laws of New York, the Attorney General has an interest and obligation to uphold the constitutionality of state statutes.

SECOND: Except by this intervention, neither the State of New York the Attorney General thereof, or any agency or officer or employee of the state is a party hereto.

THIRD: The plaintiffs' complaint has drawn in question the plaintiffs' claim that Uniform Commercial Code, §§ 7-209, 7-210 are unconstitutional on stated grounds.

FOURTH: This statute of the State of New York affects the public interest and the public interest would be greatly prejudiced if the contention that said act is unconstitutional were sustained.

FIFTH: Denies knowledge or information sufficient to form a belief as to each and every allegation but denies paragraphs 28, 29 and 30 namely that U.C.C. §§ 7-209, 7-210 are unconstitutional.

FOR A FIRST DEFENSE

SIXTH: Denies that the court has jurisdiction over the subject matter of this complaint.

SEVENTH: The statute does not authorize seizure of property. The defendants have lawful possession.

EIGHTH: There is no state action involved in the execution of the lien by non-judicial sale.

Answer of Louis J. Lefkowitz

FOR A SECOND DEFENSE

NINTH: The challenged statute provides notice and an opportunity to be heard before sale. Due process is provided by the requirement for notice before sale.

FOR A THIRD DEFENSE

TENTH: The action is inappropriate for class action relief as the plaintiffs' demands may result in a situation adverse to the interests of many consumers — availability of moving services only on pre-payment — and notice would be impossible.

WHEREFORE, the Attorney General of the State of New York respectfully requests that the complaint be dismissed.

LOUIS J. LEFKOWITZ

A. SETH GREENWALD

ANSWER OF FLAGG BROTHERS, INC. AND HENRY FLAGG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated and HENRY FLAGG, individually and as President of Flagg Brothers, Inc. for their answer to the complaint allege:

1. Admit the allegations contained in Paragraph "1" of the complaint except denies that New York Uniform Commercial Code Section 7-209 and 7-210 violate any provision of the United States Constitution; admit the allegations contained in Paragraphs "10", "11", "20", "22", "23" and "24" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to Paragraphs "9", "12", "13", "17" and "18".

3. Deny each and every allegation contained in Paragraphs "2" through and including "8", "14", "15", "16", "19", "25" and "26" through and including "31" of the complaint.

FIRST DEFENSE

4. The complaint fails to state a claim upon which relief can be granted, in that the plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to a foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets with the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and whereas the amount actually in controversy as to the named plaintiff's claim is less than TEN THOUSAND ($10,000.00) DOLLARS exclusive of interest and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the plaintiff complains consisting of the alleged detention of plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

WHEREFORE, Defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, respectfully request:

(1) That the Court enter judgment dismissing the actions in 73 Civ. 4050 upon the following grounds:

(a) the complaint fails to state a claim upon which relief can be granted;

(b) the Court lacks subject matter jurisdiction over either action;

(c) the required state action under the 14th Amendment is lacking;

(2) That the Court enter judgment finding Sections 7-209 and 7-210 of the Uniform Commercial Code of the State of New York to be constitutional under the due process and equal protection clauses in Amendment XIV to the United States Constitution;

(3) That the Court grant no relief to plaintiff or any others similarly situated whom either plaintiff seeks to represent.

(4) That the Court grant Defendants such other and further relief as may be proper.

Dated: New York, New York
March 29, 1974

s/ Alvin Altman
ALVIN ALTMAN

CLASS ACTION STIPULATION (PLAINTIFF CLASS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that this consolidated action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the plaintiff class consists of all persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due without prior notice and an opportunity for a judicial hearing prior to the imposition of the lien and the sale of the goods.

This action is a proper class action because: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law common to the class, namely the constitutional validity of the New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the claim of the representative plaintiffs are typical of the claims of the members of the class; (d) The Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard prior to the imposition of a lien on and sale of plaintiffs' property, have acted and refused to act on grounds generally applicable to the class.

This action is a proper class action only with respect to plaintiffs' claims for injunctive and declaratory relief and not with respect to plaintiff Brooks' claim for damages or to plaintiff Morant's claim for damages.

Class Action Stipulation (Plaintiff Class)

[subscriptions of attorneys omitted in printing]

DATED: February 1974

SO ORDERED:

U. S. DISTRICT COURT JUDGE

CLASS ACTION STIPULATION (DEFENDANT CLASS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that this consolidated action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the defendant class consist of all warehousemen, as defined by New York Uniform Commercial Code §7-102 (h), doing business in the State of New York who impose liens upon goods stored with such warehousemen pursuant to Section 7-209 of the New York Uniform Commercial Code and who subject such goods to sale pursuant to Section 7-210 of the New York Uniform Commercial Code without affording the owner of the goods notice and an opportunity for a judicial hearing prior to imposition of the lien and the sale of the goods.

This action is a proper class action because: (a) the defendant class, consisting of approximately 200 to 300 warehouses located within the State of New York, is so numerous that joinder of all members is impracticable; (b) there

are questions of law common to the class, namely, the constitutional validity of New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the defenses and claims of the representative defendants are typical of the claims of the members of the class; (d) the law firm of Brodsky, Linett and Altman as attorneys for defendants Flagg, Flagg Brothers, Inc., and for Intervenor-Defendant New York State Movers & Warehouseman's Associates, Inc., will adequately protect the interest of the defendant class; and (e) the party opposing the class has acted on grounds generally applicable to the class thereby making appropriate declaratory relief with respect to the class as a whole.

[Subscriptions of attorneys omitted in printing]

DATED: February 1974

SO ORDERED:

U.S. DISTRICT COURT JUDGE

NOTICE OF MOTION TO INTERVENE: GLORIA JONES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

TO THE DEFENDANTS:

PLEASE TAKE NOTICE that GLORIA JONES will bring on for hearing before the United States District Court in Room 7 of the United States Courthouse, Foley Square, New York, New York, on the 29th day of April, 1974, at or as soon thereafter as counsel may be heard, a motion for an order

permitting Gloria Jones to intervene in this action, individually and on behalf of all others similarly situated, pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure as party plaintiff.

The grounds of this motion, as are more fully set forth in the proposed intervenor-plaintiff's complaint, are that the proposed intervenor is a member of the class purported to be represented by the named plaintiff and that the proposed intervenor's claims and the claims of the named plaintiff contain identical questions of law, i.e., the constitutionality and validity of New York Uniform Commercial Code, §§7-209 and 7-210. Permitting the applicant to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties.

PLEASE TAKE FURTHER NOTICE that opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return day of this motion.

Dated: April 11th, 1974.
White Plains, N.Y.

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
BY:
LAWRENCE S. KAHN, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
GENE B. REIBMAN, Of Counsel
Attorneys for Plaintiffs

INTERVENOR'S COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

I.
PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §1983. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.
JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privileges and immunities secured by the United States Constitution without regard to the amount in controversy.

3. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §1983. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

Intervenor's Complaint

III.
CLASS ACTION ALLEGATIONS

A. Plaintiff Class

4. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

5. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard, have acted and refused to act on grounds generally applicable to the class.

B. Defendant Class

6. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the

State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

7. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.
PARTIES

8. Plaintiff GLORIA JONES is a citizen of the United States and of the State of New York. Plaintiff resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is employed by the Burlington Fabrics Company, Mount Vernon, New York, for which her take home pay is approximately $87.00 per week. This is the sole source of plaintiff's income.

9. Defendant Flagg Brothers, Inc., is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of

New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

10. Defendant Henry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

V.
FACTUAL ALLEGATIONS

11. In the fall of 1973, plaintiff and her family were residing at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshall of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

12. When City Marshall James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshall Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store her goods.

13. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

14. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

15. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

16. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

17. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars (see Exhibit "A", annexed hereto). Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believes that she does not owe defendants the amount they are charging her, but in any event plaintiff cannot afford to pay defendants this amount.

18. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued detention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed hereto as Exhibit "B". Defendants have threatened to sell these goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity to be heard. The sale

of these goods wihout a prior hearing will cause plaintiff and her family further grave and irreparable injury in that the goods being sold by defendant Flagg Brothers constitute essential items of household furniture which plaintiff, because of her limited income of approximately $87.00 per week, cannot afford to replace.

19. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.
LEGAL CLAIMS

20. Defendants' imposition of a lien on plaintiff's goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. New York Uniform Commercial Code §§7-209 and 7-210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in a warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

22. New York Uniform Commercial Code §§7-209 and 7-210 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that these

statutes have the effect irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in subsequent legal proceedings, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

WHEREFORE, plaintiff respectfully prays on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees, agents and successors from encumbering plaintiff's goods and selling these goods without affording plaintiff an opportunity to be heard;

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-

209 & 7-210 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter a final judgment awarding plaintiff $3,000 actual and nominal damages against the defendants jointly and severally.

4. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

5. Award plaintiffs their costs, disbursements and attorneys' fees.

6. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: April 11th, 1974
White Plains, New York

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

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EXHIBITS TO INTERVENOR'S COMPLAINT

EXHIBIT A — NOTICE OF BILL

If she p/u charges are:

75.00 — platform chg.
35.00 — Legal Fees
225.00 — Storage Due
$335.00

If Flagg Bros. Moves You:

165.00 — moving est.
35.00 — Legal Fees
75.00 — platform
225.00 — Storage
$500.00

EXHIBIT B — LIST OF HOUSEHOLD GOODS

1. 2 Full size beds

2. 2 long dressers

3. Dining room table and 6 chairs

4. Hutch

5. 3 piece Wicker Chair set

6. 2 mirrors

7. 2 end tables

8. Gas stove

9. Refrigerator

Exhibit B

10. Cabinet for dishes

11. Clothes

12. Lamps

13. Carpet

— Other goods

NOTICE OF MOTION TO INTERVENE: TWO ASSOCIATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ARNOLD H. SHAW, sworn to April 11, 1974, the undersigned will make a motion for leave to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure at Room 2904, the United States Courthouse, Foley Square, New York, New York 10007 on the 24th day of April, 1974 at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order allowing the Warehousemen's Association of the Port of New York, Inc., and the Cold Storage Warehousemen's Association of the Port of New York to intervene in defense of the constitutionality of Uniform Commercial Code Sections 7-209 and 7-210, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 11, 1974

Yours, etc.

JAFFE, SHAW &
ROSENBERG,
Attorneys for the
Warehousemen's Association
of the Port of New York, Inc.
and the Cold Storage
Warehousemen's Association of
the Port of New York

(Service list omitted)

AFFIDAVIT OF ARNOLD H. SHAW IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am a member of the firm of Jaffe, Shaw & Rosenberg, attorneys for the movants hereinafter named and I make this affidavit in support of their motion to intervene.

The Warehousemen's Association of the Port of New York (hereinafter referred to as the "Association") is a membership corporation of the State of New York. The Cold Storage Warehousemen's Association of the Port of New York

(hereinafter referred to as the "Cold Storage Association") is an unincorporated association. The Association is a trade association consisting of many public warehousemen doing business in the City of New York and in the metropolitan New Jersey area who are engaged in the commercial warehousing business. These members store, handle and distribute merchandise, commodities and materials of every character and description. The Cold Storage Association is also a trade association. Its members do business in the same vicinity, and their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their storage. Both of the movants store, handle and distribute goods, wares, merchandise, materials and commodities primarily for and on behalf of merchants and other commercial and business entities who are engaged in interstate and international commerce. The movants' members are, accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the members of both movants are importers who store their goods in United States customs bonded facilities maintained by many of movants' members.

The main thrust of the complaint, is to achieve a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. It goes without saying, therefore, that an adjudication of invalidity on constitutional grounds would have consequences that far transcend the rights of the plaintiffs and the defendants, and would vitally affect the rights and interests not only of the members of the Association and the Cold Storage Association, but of all public warehousemen doing business in the entire metropolitan area and, indeed, in virtually the entire nation, the Uniform

Commercial Code having been adopted by all states, with the exception of Louisiana, and by the District of Columbia and the Virgin Islands. (5 Bender's U.C.C. Service, ¶ 11.05).

If Sections 7-209 and 7-210 are declared unconstitutional, the consequences to the commercial public warehouse industry would be devastating. From time immemorial, public warehousemen have depended upon the security of the warehousemen's lien in readily taking into their establishments for storage goods of every description from all types of bailors. Without the lien, warehousemen would, of necessity, be required to be selective, and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. This would not only ruinously curtail the business of every warehouseman, but it would seriously interfere with and disrupt trade, commerce and industry.

I recognize that the principal defendant herein, Flagg Brothers, Inc. has interposed a defense "individually and as representative of a class of all others similarly situated". It is respectfully submitted, however, that the members of the Association and the Cold Storage Association are not situated similarly to the defendant, Flagg Brothers, Inc. It is true that Flagg Brothers is a public warehouseman entitled to a warehousemen's lien and the enforcement thereof under the subject U.C.C. sections, but this is where the similarity ends. The defendant, Flagg Brothers, upon information and belief, is engaged in the storage and moving of furniture and household furnishings and as such, it deals primarily with members of the general public. The membership of the Association and the Cold Storage Association, however, as already indicated, differ from the defendant, Flagg Brothers, in that they deal primarily with goods that are in trade, commerce and industry. Therefore, the membership of the Association and the Cold Storage

Association is not adequately represented in the within action and yet, these members have a vital stake in the outcome of the litigation insofar as the issue of constitutionality of Sections 7-209 and 7-210 of the Uniform Commercial Code are concerned.

From all of the foregoing, it is clear that the moving parties' defense and the main action have a question of law in common and, accordingly, intervention is appropriate pursuant to Rule 24, FRCP.

It is the intention of the movants to limit their participation herein to the question of constitutionality. They do not intend to become involved in the other factual issues. The rights of the original parties, therefore, cannot conceivably be delayed or prejudiced.

WHEREFORE, I respectfully request that the motion of the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York to intervene be granted.

s/ Arnold H. Shaw
ARNOLD H. SHAW

Sworn to April 11, 1974

ANSWER OF TWO ASSOCIATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

The Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York answering the complaint herein allege:

Answer of Two Associations

1. Deny each and every allegation contained in Paragraphs 1 through 4 of the complaint.

2. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5 through 27 of the complaint.

3. Deny each and every allegation contained in Paragraphs 28 through 30 of the complaint.

4. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the complaint.

FIRST DEFENSE

5. Section 7-209 and Section 7-210 of the Uniform Commercial Code do not offend the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that the bailor of goods stored in a warehouse is afforded ample opportunity to be heard for the purpose of contesting the validity of a lien and a sale by way of enforcement thereof inasmuch as reasonable notice and advertising in advance of the actual sale are required.

SECOND DEFENSE

6. This court lacks jurisdiction in that the matter in controversy may properly be brought before a state or local court where a full and adequate remedy is available to the individual plaintiff.

THIRD DEFENSE

7. The claim of unconstitutionality is frivolous, and its insertion in the complaint does not alter the fact that the amount

Answer of Two Associations

in controversy is less than $10,000.00, exclusive of interest and costs, and that the essential element of diversity is lacking.

FOURTH DEFENSE

8. The controversy herein relates exclusively to allegations of acts by private individuals and actions by agencies of the State of New York or of any of its political sub-divisions are not involved; therefore, the Fourteenth Amendment of the United States Constitution is inapplicable.

FIFTH DEFENSE

9. The action is inappropriate for a class action relief as the granting of plaintiffs' demand that Sections 7-209 and 7-210, Uniform Commercial Code be declared unconstitutional would directly affect commercial and refrigerated warehouses whose businesses are dissimilar to the business of the defendants but who are, nevertheless bound by and subject to Sections 7-209 and 7-210, supra.

SIXTH DEFENSE

10. The action is inappropriate for a class action for the further reasons that whereas, upon information and belief, the defendants and others similarly situated are engaged primarily in local and intrastate activity, the members of the commercial and refrigerated industry represented by movants are engaged primarily in interstate commerce, and, in addition, whereas the defendants and others similarly situated deal primarily with consumers and the general public, the members of the commercial and refrigerated industry represented by movants deal primarily with merchants and others engaged in industry and commerce, yet, a declaration of unconstitutionality of Sections 7-209 and 7-210, supra, would directly and adversely affect the commercial and refrigerated warehouses.

WHEREFORE, it is respectfully requested that the complaint herein to the extent that it seeks a declaration of constitutional invalidity of Sections 7-209 and 7-210 of the Uniform Commercial Code be dismissed.

JAFFE, SHAW
& ROSENBERG,

s/ Arnold H. Shaw
ARNOLD H. SHAW,
a Partner

NOTICE OF MOTION TO INTERVENE: AWA AND IARW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

PLEASE TAKE NOTICE that upon the points and authorities as set forth in the attached memorandum, the undersigned will move this Court at a Motion Term held at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, in Room 2904 thereof, on the 1st day of May, 1974 at Ten O'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting the above named applicant for intervention, leave to intervene as a party defendant.

Dated: New York, New York
April 17, 1974

WERNER & WEISS

s/ Martin Werner
MARTIN WERNER
Attorneys for Applicant
For Intervention

(Service list omitted)

MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., move for leave to intervene as Defendants in this action and as grounds for such motion, state as follows:

I.

This action is brought to declare that the warehouseman's lien under the New York Uniform Commercial Code §7-209 and §7-210 violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

American Warehousemen's Association is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the

national trade association for the public merchandise warehousing industry, having 478 members who operate warehouses in all states, except Hawaii, Mississippi, South Dakota and West Virginia. The member warehouses account for approximately 1,801,218,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. The member warehouses provide warehouse and distribution services to business and industry.

III.

International Association of Refrigerated Warehouses, Inc., is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is the national trade association for the public refrigerated warehousing industry, having 218 member companies in the United States who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. The member warehouses account for about 567,000,000 cubic feet of public refrigerated warehouse space which comprises over 75% of the total public refrigerated warehouse space in the United States. The member warehouses provide warehouse and distribution services for manufacturers, processors and distributors of food products and other goods requiring refrigeration.

IV.

The Uniform Commercial Code has been adopted in 49 states and the District of Columbia, including the State of New York. The provisions of §§7-209 and 7-210 respecting the creation and enforcement of the warehouseman's lien apply to the warehousing business of the applicant's members in New York as well as the other states which have adopted the Uniform Commercial Code. The constitutionality of the lien provisions which govern innumerable warehousing transactions is a subject

in which the applicants have a vital and substantial interest. If the warehouseman's lien provisions of the UCC are held to be unconstitutional the adverse effect upon applicants' members would be substantial. Their interest in upholding the constitutionality of the involved provisions requires that they be permitted to assert their defenses to the instant action. Since their interests as public warehouses for commercial and industrial accounts may differ from the interests of the warehousemen of household goods the applicants' interests are not adequately represented by existing parties.

V.

The applicants' defenses to the claimed unconstitutionality of the warehouseman's lien provisions of the Uniform Commercial Code present questions of law and fact which are common to the main action. Applicants have a substantial interest in the resolution of these questions since a determination of unconstitutionality would cause substantial disruption to existing and long standing commercial relationships and practices. The intervention of applicants would not unduly broaden the issues involved in this proceeding or delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., request that their motion for leave to intervene in this action as party defendants be granted and that leave be granted to file the attached Answer instanter.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

Motion to Intervene

s/ William H. Towle
WILLIAM H. TOWLE
HARDMAN, BURKE,
KERWIN & TOWLE
Their Attorneys

s/ Martin Werner
MARTIN WERNER
DATED: April 17, 1974

ANSWER OF AWA AND IARW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

AMERICAN WAREHOUSEMEN'S and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., intervening defendants, answer the Complaint in this action as follows:

1. Admit that Plaintiff seeks class action status and the relief requested in paragraph 1 of the Complaint, but deny that New York Uniform Commercial Code Sections 7-209 and 7-210 violate any provisions of the United States Constitution.

2. Deny knowledge or information sufficient to form a belief as to paragraphs 9 through and including 26 of the Complaint.

3. Deny each and every allegation contained in paragraphs 2 through and including 8 and 27 through and including 31 of the Complaint.

Answer of AWA and IARW

FIRST DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted, in that the Plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to the imposition or foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Uniform Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and the amount actually in controversy as to the named Plaintiff's claims is less than Ten Thousand Dollars ($10,000.00) exclusive of interests and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the Plaintiff complains consisting of the alleged detention of Plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

WHEREFORE, Intervening Defendants, AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., respectfully request:

(1) That the Court enter judgment dismissing the actions in 73 Civ. 4050 upon the following grounds:

(a) the Complaint fails to state a claim upon which relief can be granted;

(b) the Court lacks subject matter jurisdiction over either action;

(c) the required state action under the 14th Amendment is lacking;

(2) That the Court enter judgment finding Sections 7-209 and 7-210 of the Uniform Commercial Code of the State of New York to be constitutional under the due process and equal protection clauses in Amendment XIV to the United States Constitution;

(3) That the Court grant no relief to Plaintiff or any others similarly situated whom Plaintiff seeks to represent.

(4) That the Court grant Intervening Defendants such other and further relief as may be proper.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

WILLIAM H. TOWLE

MARTIN WERNER

DATED: April , 1974.

AFFIDAVIT OF ALVIN ALTMAN IN OPPOSITION TO JONES' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALVIN ALTMAN, being duly sworn, deposes and says:

1. I am associated with Brodsky, Linett and Altman, attorneys for defendants and have knowledge of the facts recited herein from my investigation of the case and conversations with defendant, HENRY FLAGG, president of the corporate defendant.

2. This affidavit is submitted in opposition to the motion of GLORIA JONES, for leave to intervene in the above action upon the grounds that the proposed intervenor, GLORIA JONES, (1) is not a proper party to represent the plaintiffs in this action, and (2) she has no justiciable claim against the defendants in common with the claims presented in the main action. It is further respectfully submitted that intervention would unduly delay and prejudice the rights of the original parties.

Affidavit of Alvin Altman in Opposition to Jones' Intervention

3. Both the main action and the intervenor's lawsuit challenge the constitutionality of N.Y. U.C.C. Sections 7-209 and 7-210, the warehousemen's lien laws of New York State under the U.S. Constitution. The Court cannot hear the proposed intervenor's lawsuit and this lawsuit cannot be maintained as a class action if the provisions of Sections 7-209 and 7-210, particularly the latter statute, were not followed in the proposed intervenor's case.

4. As alleged in the proposed complaint, defendants removed Mrs. JONES' belongings from the sidewalk in front of her apartment building at 353 Mundy Lane, Mount Vernon, New York, to storage in November, 1973, following her eviction from the apartment by a City Marshal. This was done with the knowledge, consent and approval of both Mrs. JONES and the Department of Social Services of Westchester County. The said Department paid defendants transportation charges for the removal and for one month's storage. A copy of a letter dated December 13, 1973 from the Department to defendants is annexed. After one month of storage, Mrs. JONES was personally responsible for the storage charges in an amount which she knew and which she refused to pay after due demand. Although defendant advised Mrs. JONES that her belongings could be sold for delinquency in payment, defendant did not at any time initiate the procedure required under Section 7-210 before a sale is authorized.

5. In point of fact, Mr. KAHN, attorney for the proposed intervenor has spoken with your deponent and I have advised him defendants have no intention of selling the goods and if defendants do so decide, I will inform him well in advance of any sale.

6. In the main action Mrs. BROOKS' goods have been returned to her in their entirety and the dispute to that extent has been settled. The only questions remaining therein are a

Affidavit of Alvin Altman in Opposition to Jones' Intervention

claim for damages in the amount of $500.00 for alleged wrongful detention of her belongings and the question of constitutionality of the challenged sections of the Uniform Commercial Code.

WHEREFORE, for the reasons stated in the accompanying memorandum of law defendants respectfully submit that the motion for intervention should be denied.

s/ Alvin Altman
ALVIN ALTMAN

Sworn to April 25, 1974

EXHIBIT TO AFFIDAVIT

(Reproduced as Exhibit E to affidavit of Henry Flagg, this Appendix, *infra*.)

AFFIDAVIT OF GENE F. REIBMAN IN OPPOSITION TO ASSOCIATIONS' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

GENE F. REIBMAN, being duly sworn deposes and says:

1. I am of counsel to the Legal Aid Society of Westchester County, the attorney for plaintiff Brooks and proposed plaintiff-intervenor Jones. I make this affidavit in opposition to the applications of The American Warehousemen's Association; the International Association of Refrigerated Warehouse, Inc.; the Warehousemen's Association of the Port of New York, Inc.; and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant.

2. It is apparent from a reading of the affidavits in support of the motions to intervene that said proposed intervenor-defendants have no "interest relating to the property or transaction which is the subject of [this] action" within the meaning of F.R. Civ. P. Rule 24(a)(2), nor, do they assert a "claim or defense" within the meaning of rule 24(b)(2).

3. Plaintiff has no objection to the proposed intervenors-defendants participating in this action as *amicus curaie*.

WHEREFORE, your affiant respectfully prays that the motions of The American Warehousemen's Association; the International Association of Refrigerated Warehouses, Inc.; the Warehousemen's Association of the Port of New York, Inc.;

and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant be denied.

Sworn to April 30, 1974

s/ Gene F. Reibman
GENE F. REIBMAN

(Service list omitted)

AFFIDAVIT OF LAWRENCE S. KAHN IN SUPPORT OF JONES' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

LAWRENCE S. KAHN, being duly sworn, deposes and says:

FIRST: I am an attorney on the staff of The Legal Aid Society of Westchester County and as such am fully familiar with the facts relating to the instant motion by Gloria Jones to intervene as a party plaintiff.

SECOND: Upon information and belief, on April 10, 1974, Gene B. Reibman, another staff attorney associated with The Legal Aid Society of Westchester County, telephoned Mr. Altman, an attorney associated with the firm of Brodsky, Linett

& Altman, attorneys for defendant herein, and advised him that The Legal Aid Society intended to move forthwith to intervene Gloria Jones as a party plaintiff. Mr. Reibman sought assurance from Mr. Altman that, pending a determination of Mrs. Jones' motion, her household goods would not be sold by the defendant. Mr. Altman responded that he would contact defendant Flagg Brothers to see if the latter would be willing to make such an assurance and that he would call Mr. Reibman back to inform him of the result of that conversation.

THIRD: Based upon that conversation, and based upon the fact that in the main action herein Mr. Altman had months earlier assured Mr. Reibman that the goods of the named plaintiff Brooks would not be sold pending the outcome of the action and had, in fact, subsequently arranged for the return of Ms. Brooks' goods, I assumed that, at least until Mr. Altman returned Mr. Reibman's telephone call, Mrs. Jones' goods would not be sold. It was this assumption which convinced me that there was no need to seek a temporary restraining order to prevent the sale of Mrs. Jones' household possessions.

FOURTH: On or about April 22, 1974, following the service and filing of the instant application, I telephoned Mr. Altman to inquire whether he would be able to provide assurance to me that Mrs. Jones' goods would not be sold. At that time he stated that he was able to give me such assurance and that Mrs. Jones' goods would not for the present be sold. Therefore, the fact that I did not seek a temporary restraining order on behalf of the proposed intervenor should not prejudice Mrs. Jones' motion to intervene as a party plaintiff.

s/ Lawrence S. Kahn
LAWRENCE S. KAHN

Sworn to May 1, 1974

DISTRICT COURT OPINION AND ORDER #40873 GRANTING INTERVENTION TO ALL MOVANTS, 63 F.R.D. 409 (S.D.N.Y. 1974)

(Reproduced in petition for certiorari in No. 77-37, at 47a.)

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION AND FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

TO THE DEFENDANTS AND DEFENDANT-INTERVENORS:

PLEASE TAKE NOTICF that upon the annexed affidavits and the exhibits annexed thereto and upon defendant Flagg Brothers' answers to interrogatories, and upon all the papers previously filed in this action, plaintiffs and the plaintiff-intervenor will move this Court at a Motion Term to be held in Room 706 of the United States Courthouse, Foley Square, New York, New York, on the 9th day of September, 1974, at 10:00 A.M., or as soon thereafter as counsel can be heard:

1. For an order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining this action to be a proper plaintiff and defendant class action;

The grounds of that motion, as are more fully set forth in the annexed affidavits, exhibits, the answers to interrogatories, and the memorandum of points and authorities submitted in support of this motion are that with respect to both the plaintiff and defendant classes, all of the requirements of Rule 23(a) are satisfied in that the class is so numerous that joinder of all members is impracticable, the questions of law and fact are

common to the class, namely, the constitutionality of New York Uniform Commercial Code, §§7-209 and 210, the claims and defenses of the representative parties are typical of the claims and defenses of the class, and the representative parties will fairly and adequately protect the interests of the classes. In addition, the requirement of Rule 23(b) is met in that the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

2. For an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting plaintiff and the plaintiff-intervenor and the class they represent summary judgment for the injunctive and declaratory relief prayed for in the complaint and on all issues except the amount of damages.

The grounds of this motion, as are more fully set forth in the annexed affidavits and exhibits and in plaintiffs' memorandum of points and authorities in support of this motion, are that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law in that New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that these provisions authorize the imposition of a lien and sale of bailed goods by a warehouse company without a prior hearing.

Plaintiffs further move pursuant to Rule 56(d) of the Federal Rules of Civil Procedure that if summary judgment is not rendered upon the whole case or for all the relief prayed for and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.

Notice of Motion For Class Action Determination and For Summary Judgment

PLEASE TAKE FURTHER NOTICE that answering memoranda and affidavits, if any, must be served on counsel for plaintiffs at least three days prior to the return date of this motion.

Respectfully submitted,

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

Dated: August 26, 1974
White Plains, New York.

AFFIDAVIT OF SHIRLEY HERRIOTT BROOKS IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

SHIRLEY HERRIOTT BROOKS, being duly sworn, deposes and says:

1. I am the plaintiff in this action, and I am a citizen of the United States and of the State of New York. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' motion for a class action determination and summary judgment.

Affidavit of Shirley Herriott Brooks in Support

1a. I reside at 120 North Kensico Avenue, White Plains, New York, with my three children, George, Jr., age 13, Tonya, age 12 and Michael, age 11. My husband died in an automobile accident approximately two years ago. I am employed as a homemaker for which I earn $2.50 per hour.

2. In the Spring of 1973, my family and I were residing at 33 North 3rd Avenue, Mount Vernon, New York. My landlord had obtained an order of eviction against me and on June 13, 1973, James A. Levister, the City Marshall of the City of Mount Vernon, New York, appeared at my residence to dispossess my family and I from our residence.

3. I informed Mr. Levister at that time, on June 13, 1973, that I wanted to call someone to store my furniture and other household possessions. Mr. Levister informed me that I would not be able to get anyone to store my furniture and that there was a man with him, defendant Henry Flagg, who would store my furniture. I was led to believe by Mr. Levister's comments that I had no choice but to let defendant Flagg store my goods.

4. I then asked defendant Flagg how much it would cost to move and store my goods. Defendant Flagg informed me that I would have to pay $65.00 per month for the moving and storage of the furniture. I told defendant Flagg that this sounded like a high price, but as I believed that I had no choice in the matter, I told defendant Flagg to proceed with the moving and storage of my furniture and household possessions.

5. After my goods were loaded on one of the defendant Flagg Brothers' trucks, a moving man told me that I would have to pay $178.00. I protested since I had been told that $65.00 was the entire cost. The moving man explained that I would have to pay $75.00 per month for storage, $75.00 for barrelling and platforming, and $28.00 for fumigating for a total of $178.00. I asked whether I had to have fumigating and the moving man

responded that fumigating was required. I believed that I had no choice in the matter but to pay and, after first insisting on payment in cash, defendant Flagg agreed to accept my check for $178.00.

6. After I was evicted, my children and I moved into my cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

7. On or about June 15, 1973, I called defendant Flagg Brothers in order to find out how long they would store my goods for the $178.00 payment. An employee of defendant Flagg Brothers informed me that I owed defendant Flagg Brothers an additional $156.00.

8. On or about June 19, 1973, I went to defendant Flagg Brothers' office in Mount Vernon, New York. I was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the $178.00 payment as a "deposit" and that there was a "balance due" of $156.00. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". I informed defendant Henry Flagg that his prices were unreasonable and that I couldn't afford to pay them. Defendant Flagg informed me that on the first day of July, 1973, I would owe an additional $75.00 for storage for the month of July. I told defendant Flagg that my one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed me that storage charges are incurred on a "per month" basis, and that even if my goods had been stored on June 29, 1973, an additional $75.00 would be due on July 1, 1973.

9. On or about June 29, 1973, I telephoned defendant Flagg. During the course of the telephone conversation, defendant Flagg offered to let me remove my goods by July 13,

1973 if I would pay the balance of the original bill allegedly then due in the amount of $156.00 plus $45.00. I restated my position to defendant Flagg that my original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, I was unable to remove my goods by July 13, 1973, because I was still sharing an apartment with my cousin and there was insufficient space in the apartment for my belongings.

10. Approximately one week later, in early July, 1973, I again telephoned defendant Henry Flagg, this time to arrange for a delivery date for my goods. Mr. Flagg's secretary gave me a date of August 14, 1973, and told me that I could obtain my possessions only if I paid $484.00 in cash. I was told that this amount included the past balance allegedly due. I then spoke to defendant Flagg and was told by him that payment has to be in cash and checks or money orders would not be accepted.

11. On or about August 25, 1973, I received a letter dated August 22, 1973, from defendant Flagg Brothers stating that:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due $156.00
> Storage for 7/73 & 8/73 $150.00 at $75. a month
>
> Total Due $306.00"

A copy of this letter is annexed hereto as Exhibit "B". Accompanying this letter from defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing me that unless payment on the storage account was made, defendant Flagg

Brothers would advertise my goods for public auction. A copy of this Notice is annexed hereto as Exhibit "C".

12. On August 24, 1973, I wrote to defendant Flagg Brothers detailing my position and claims regarding defendant Flagg's billing computations and methods. A copy of this letter is annexed hereto as Exhibit "D".

13. On August 23, 1973, my attorney wrote to defendant Flagg Brothers contesting defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed hereto as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to my letter, states in part that "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed hereto as Exhibit "F".

14. All of my goods stored consisted of essential items of household goods and furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed hereto as Exhibit "G".

15. Defendant Flagg Brothers' retention of my goods from June 13, 1973, to January 24, 1974, caused my children and I irreparable injury in that we were forced to do without all of the essential items of furniture and household goods set forth in Exhibit "G". My children and I were forced to sleep on the floor on the one remaining mattress that we had. We had to do without most of our clothes and were often forced to wear the same clothes day after day. We ate on paper plates, and had to buy duplicate pots and other household goods. Because my nurses uniforms were stored, I missed one and a half months of work. I had previously been working as a nurses aid earning a take home pay of approximately $100.00 per week. I did not have sufficient funds to buy duplicate uniforms. I finally saved

enough money to buy one uniform so I could return to work. In addition, my children and I had to do without curtains, shades and other household essentials.

16. On September 21, 1973, my attorney instituted this action for declaratory and injunctive relief and for damages against defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshal of the City of Mount Vernon, New York. By stipulation between my attorneys and the attorney for defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon me by reason of the storage of my goods with defendants from November 5, 1973, to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between my attorneys and the attorneys for defendants Henry Flagg and Flagg Brothers, Inc., I was permitted by defendant Flagg Brothers to remove, and did remove, all my goods from the defendant Flagg Brothers' warehouse.

WHEREFORE, your affiant respectfully prays that this Court grant her Judgment pursuant to F. R. Civ. P. 56, and grant for such other and further relief as to the Court may seem just and equitable.

s/ Shirley Herriott Brooks
Shirley Herriott Brooks

Sworn to August 15, 1974

EXHIBITS TO AFFIDAVIT

(Reproduced as Exhibits to Verified Complaint, this Appendix, *supra*.)

AFFIDAVIT OF GLORIA JONES IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

GLORIA JONES, being duly sworn, deposes and says that:

1. I am a citizen of the United States and of the State of New York. I am the plaintiff-intervenor in the above action. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' and plaintiff-intervenor's motions for a class action determination and summary judgment.

2. I reside alone at 670 East Lincoln Avenue, Mount Vernon, New York. I am a recipient of public assistance.

3. In the fall of 1973, I resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against me in the City Court of Mount Vernon, and a warrant of eviction that had been issued against me by this Court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove my possessions and me from my apartment.

4. When City Marshal James A. Levister appeared on November 26, 1973, at my apartment to remove my possessions

and me, I tried without success to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom I should call to store my furniture and other household possessions. City Marshal Levister informed me that I could not get anyone to store my furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store my goods. Employees of defendant Flagg Brothers then loaded my household goods and furniture on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

5. I did not on November 26, 1973, and at no time thereafter, authorize defendant Flagg Brothers, Inc., to store my furniture and household possessions, either by written or oral contract, or otherwise. I was not advised of the rate I would have to pay for the storage of my goods.

6. After I was evicted from my apartment at 353 Muncy Lane, Mount Vernon, New York, I moved into my daughter's apartment at 616 East Lincoln Avenue, Mount Vernon, New York, and therafter into my son's house at 220 South 9th Avenue, Mount Vernon, New York. I now reside by myself in an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

7. In March, 1974, I contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that I would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire my household goods. I was informed by this employee that, if I had not contacted Flagg Brothers at that time, my goods would have been sold immediately thereafter. I had never been previously notified that such a sale would take place.

8. I subsequently complained to defendants that the price

they charged to move and store my goods was unreasonable, and that I had not contracted to pay Flagg Brothers any sum for the storage of my goods. Thereupon, an employee of defendant Flagg Brothers gave me a written notification that my bill was actually only Five Hundred Dollars, and that if I arranged to move my goods from Flagg Brothers' warehouse by my own means my bill would be reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed hereto as Exhibit "A". I was then informed by an employee of defendant Flagg Brothers that if I were unable to pay the entire bill by approximately April 12, 1974, my stored goods would be sold. I believe that I did not owe the amount defendants sought to charge me.

9. All of my furniture and household goods are presently in Flagg Brothers' warehouse. I have had to reside without them since November 26, 1973. A copy of a list of these goods is annexed hereto as Exhibit "B".

10. The deprivation of my furniture and other household goods has caused me substantial and irreparable injury in that:

a) As a result of the strain caused by being without furniture, I suffered a nervous breakdown, for which I was hospitalized, and continue to suffer from extreme nervousness;

b) I have not invited any friends into my home because of my embarrassment at having no furniture;

c) I have purchased fabric and other materials in order to make clothes to replace several of the articles of clothing that are being stored by defendants;

d) For several months after defendants took my furniture, I slept in one bed with my daughter's two

children, ages 3 and 6, and thereafter with my son's two children, ages 2 and 7.

e) Since November 26, 1973, I have had to live without most of my furniture, clothing and other possessions.

11. After my motion to intervene was filed in this action, my attorney received a letter dated May 21, 1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed hereto as Exhibit "C".

12. On June 5, 1974, an agreement was reached between my counsel and counsel for defendant Flagg whereby I would obtain my goods from defendant Flagg upon payment of $410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg reflecting this agreement is annexed hereto as Exhibit "D".

13. By letter from defendant Flagg's counsel to my counsel

dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. This letter states in part that "any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests." Although the attorney for Flagg Brothers alleges in the letter that on three occasions I arranged with Mr. Flagg to pick up my goods on a day certain, I in fact never made any such arrangements. A copy of the letter of June 28, 1974, is annexed hereto as Exhibit "E".

WHEREFORE, I respectfully pray that this Court grant plaintiffs' motions for a class action determination and summary judgment.

s/ Gloria Jones
GLORIA JONES

Sworn to August 1, 1974

EXHIBITS TO AFFIDAVIT

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EXHIBITS A AND B

(Reproduced as Exhibits A and B to Intervenor's Complaint, this Appendix, *supra.*)

EXHIBIT C — A. ALTMAN'S LETTER OF MAY 21, 1974

Brodsky, Linett and Altman
Counselors at Law
1776 Broadway
New York, N.Y. 10019

(212) Circle 5-7700

May 21, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall — Roosevelt Square
Mount Vernon, New York 10550

Attention: Lawrence S. Kahn, Esq.

Re: Gloria Jones v. Flagg Brothers, Inc., et al.

Dear Mr. Kahn:

This is in response to your letter dated May 16, 1974.

Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.

Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

Exhibit C

It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot.

Very truly yours,

BRODSKY, LINETT & ALTMAN

s/ Alvin Altman
Alvin Altman

AA:sf

cc: Flagg Brothers, Inc.

EXHIBIT D — LEGAL AID ATTORNEY'S LETTER OF JUNE 5, 1974

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
MOUNT VERNON BRANCH OFFICE
CITY HALL — ROOSEVELT SQUARE
MOUNT VERNON, NEW YORK 10550

(914) MO 8-4045

June 5th, 1974

Brodsky, Linett & Altman
Counselors at Law
1776 Broadway
New York, New York 10019

Attention: Alvin Altman, Esq.

Re: Gloria Jones v. Flagg Brothers, Inc.

Dear Mr. Altman:

This is to confirm that, pursuant to your letter of May 21st and our telephone conversations of May 29th, 30th, 31st and

Exhibit D

June 3rd, Gloria Jones is paying Flagg Brothers, Inc., the sum of Four Hundred Ten Dollars ($410.00) in order to obtain the release of her household goods presently being stored by Flagg Brothers. Payment of this money is being made solely in order to obtain possession of those goods and in no way constitutes an admission that the sum being paid is the sum due. Payment is made under protest and is without prejudice to any claims Mrs. Jones may have against Flagg Brothers, Inc., its officers and its employees, including, but not limited to, those claims asserted in her proposed intervenor's complaint, filed with her motion to intervene in *Brooks v. Flagg Brothers, Inc.*, 73 Civ. 4050 (S.D.N.Y.).

Very truly yours,

s/ Lawrence S. Kahn
LAWRENCE S. KAHN
Attorney at Law

LSK:ksj

EXHIBIT E — A. ALTMAN'S LETTER OF JUNE 28, 1974

Brodsky, Linett and Altman
Counselors at Law
1776 Broadway
New York, N.Y. 10019

(212) Circle 5-7700

June 28, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall — Roosevelt Square
Mount Vernon, New York 10550

Exhibit E

Attention: Lawrence S. Kahn, Esq.

Re: Jones v. Flagg

Dear Mr. Kahn:

We have attempted to cooperate with you in releasing your above-named client's furnishings to her based upon an understanding which you and I reached and presumably was agreed to by her.

Notwithstanding your good intentions, I must advise you that her good faith is open to serious question. During the course of the last month on three occasions she arranged with Mr. Flagg to have her goods picked up on a day certain. The removal of her goods from storage to platform from which point they are placed in a truck requires the use of labor and consequent expense. On each of the aforementioned three occasions, the last one being yesterday, June 27, 1974, Mrs. Jones failed to appear. This necessitated double labor in returning the goods to the warehouse.

In light of the above, any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests.

Very truly yours,

BRODSKY, LINETT & ALTMAN

s/ Alvin Altman
Alvin Altman

AA:sf

cc: Mr. Henry Flagg

PLAINTIFFS' STATEMENT PURSUANT TO RULE 9G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 9-G of the General Rules of this Court, plaintiffs submit the following as the material facts as to which there is no dispute.

A. Plaintiff Brooks

1. Plaintiff Shirley Herriott Brooks is a citizen of the United States and of the State of New York, and resides at 120 North Kensico Avenue, White Plains, New York, with her three minor children, George Jr., Tonya and Michael.

2. Defendant Flagg Brothers, Inc. is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant Flagg Brothers, Inc. maintains an office and is engaged in the business at 247 South Fifth Avenue, Mount Vernon, New York. Defendant Henry Flagg is President of Defendant Flagg Brothers, Inc.

3. In the Spring of 1973, Plaintiff Brooks and her family were residing at 33 North Avenue, Mount Vernon, New York. Plaintiff's landlord had obtained an order of eviction against her and on June 13, 1973, James A. Levister, the City Marshal of the City of Mount Vernon, New York, appeared at her residence to dispossess Plaintiff Brooks and her family from their residence.

4. Plaintiff Brooks informed Mr. Levister at that time that she wanted to call someone to store her furniture and other household possessions. Mr. Levister informed Plaintiff Brooks

that she would not be able to get anyone to store her furniture and that there was a man with him, Defendant Flagg, who would store her furniture. Plaintiff Brooks was led to believe by Mr. Levister's comments that she had no choice but to let Defendant Flagg store her goods.

5. Plaintiff Brooks then asked Defendant Flagg how much it would cost to move and store her goods. Defendant Flagg informed Plaintiff Brooks that she would have to pay $65.00 per month for the moving and storage of the furniture. Plaintiff Brooks told Defendant Flagg that this sounded like a high price, but as Plaintiff Brooks believed that she had no choice in the matter, she told Defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

6. After Plaintiff Brooks' goods were loaded on one of the Defendant Flagg Brothers' trucks, one of Defendant Flagg Brothers' moving men told Plaintiff Brooks that she would have to pay $178.00. Plaintiff Brooks protested, since she had been told that $65.00 was the entire cost. The moving man explained to Plaintiff Brooks that $75.00 per month was for storage, $75.00 was for barrelling and platforming, and $28.00 was for fumigating. Plaintiff Brooks then asked whether she had to have fumigating and the moving man responded that fumigating was required. Plaintiff Brooks felt then that she had no choice in the matter but to pay and after first insisting on payment in cash, Defendant Flagg agreed to accept Plaintiff Brooks' check for $178.00.

7. After Plaintiff Brooks and her family were evicted, they moved into Plaintiff's cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

8. On or about June 15, 1973, Plaintiff Brooks called Defendant Flagg Brothers in order to find out how long they would store her goods for the $178.00 payment previously made.

An employee of Defendant Flagg Brothers informed Plaintiff that she owed Defendant Flagg Brothers an additional sum of $156.00.

9. On or about June 19, 1973, Plaintiff Brooks went to Defendant Flagg Brothers' office in Mount Vernon, New York. Plaintiff was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Defendant Flagg Brothers regarded the $178.00 payment as a "deposit" and that there was a "balance due" of $156.00. A copy of this Bill of Lading and Freight Bill is annexed to the Complaint and Plaintiff Brooks' Affidavit as Exhibit "A". Plaintiff informed Defendant Flagg that his prices were unreasonable and that she couldn't afford to pay them. Defendant Flagg informed Plaintiff that on the first day of July, 1973, Plaintiff would owe an additional $75.00 for storage for the month of July. Plaintiff told Defendant Flagg that her one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed Plaintiff that storage charges are incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional $75.00 would be due by July 1, 1973.

10. On or about June 29, 1973, Plaintiff Brooks telephoned Defendant Henry Flagg. During the course of the conversation, Defendant Flagg offered to let Plaintiff remove her goods by July 13, 1973, if she would pay the balance of the original bill allegedly then due in the amount of $156.00, plus $45.00. Plaintiff restated her position to Defendant Flagg that her original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, Plaintiff was unable to remove her goods by July 13, 1973, because she was still sharing an apartment with her cousin and there was insufficient space in the apartment for her belongings.

11. Approximately one week later, in early July, 1973,

Plaintiffs' Statement Pursuant to Rule 9(G)

Plaintiff Brooks again telephoned Defendant Henry Flagg, this time to arrange for a delivery date for her goods. Mr. Flagg's secretary gave her a date of August 14, 1973, and told her that she could obtain her possessions only if she paid $484.00 in cash. Plaintiff was told that this amount included the past balance allegedly due. Plaintiff then spoke to Defendant Flagg and was told by him that payment has to be in cash and that checks or money orders would not be accepted.

12. On or about August 25, 1973, Plaintiff Brooks received a letter dated August 22, 1973, from Defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due $156.00 Storage for 7/73 & 8/73 $150.00 at $75.00 a month Total bal. $306.00"

A copy of this letter is annexed to the Complaint and to the Affidavit of Plaintiff Brooks as Exhibit "B". Accompanying this letter from Defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing her that unless payment on the storage account was made, defendant Flagg Brothers would advertise her goods for public auction. A copy of this Notice has been annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "C".

13. On August 24, 1973, Plaintiff Brooks wrote to Defendant Flagg Brothers detailing her position and claims regarding Defendant Flagg's billing computations and methods. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "D".

Plaintiffs' Statement Pursuant to Rule 9(G)

14. On August 23, 1973, Plaintiff Brooks' attorney wrote to Defendant Flagg Brothers contesting Defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to Plaintiff Brooks' letter states in part: "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed to plaintiff's affidavit as Exhibit "F".

15. All of plaintiff Brooks' stored goods consisted of essential items of household furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed to Plaintiff's affidavit as Exhibit "G". Defendant Flagg Brothers retained plaintiff Brooks' goods from June 13, 1973, until January 24, 1974, causing plaintiff and her children to reside without the use of these goods, and causing them hardship and injury.

16. On September 21, 1973, plaintiff's attorney instituted this action for declaratory and injunctive relief and for damages against Defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshall of the City of Mount Vernon, New York. By stipulation between Plaintiff's attorney and the attorney for Defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon Plaintiff Brooks by reason of the storage of her goods with the Defendants from November 5, 1973 to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between Plaintiff's attorneys and the attorneys for Defendants Flagg and Flagg Brothers, Inc., Plaintiff was permitted to and did remove all her goods from the Defendant's warehouse.

B. Plaintiff-Intervenor Jones

18. Plaintiff Gloria Jones is a citizen of the United States and of the State of New York. Plaintiff Jones resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is a recipient of public assistance.

19. In the Fall of 1973, plaintiff resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

20. When City Marshal James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshal Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, and employee of defendant Flagg Brothers, Inc., was the man who would store her goods. Employees of defendant Flagg Brothers then loaded plaintiff's goods on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

21. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

22. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

23. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

24. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed by this employee that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

25. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed to plaintiff Jones' affidavit as Exhibit "A". Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believed that she did not owe defendants the amount they were charging her.

26. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued retention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed to plaintiff Jones' affidavit as Exhibit "B".

27. After plaintiff Jones filed her motion to intervene in this action, plaintiff Jones' counsel received a letter dated May 21,

1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed to plaintiff Jones' affidavit as Exhibit "C".

28. On June 5, 1974, an agreement was reached between counsel for Jones and counsel for Flagg Brothers providing for the release of Jones' goods upon Jones' payment of $410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg is annexed to Jones' affidavit as Exhibit "D".

29. By letter from defendant Flagg's counsel to plaintiff Jones' counsel dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. A copy of the letter of June 28, 1974, is annexed to Jones' affidavit as Exhibit "E".

Respectfully submitted,

THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

NOTICE OF CROSS-MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavits, and the exhibits annexed thereto and upon all the papers heretofore filed in this action, defendants FLAGG BROTHERS, INC. and HENRY FLAGG, will cross move this Court at a Motion Term to be held in Room 1603 of the U.S. Courthouse, Foley Square, New York, New York on the 16th day of October, 1974 at 10:00 A.M., or as soon thereafter as counsel may be heard for an order pursuant to Rule 12(b)(6) of the Federal Rules dismissing the action for failure to state a claim on which relief can be based.

The grounds of this motion as more fully set forth in the annexed affidavits and exhibits and in defendants' memorandum of points and authorities in support of the cross motion are that as a matter of law New York Uniform Commercial Code Sections 7-209 and 7-210 do not violate the due process clause of the 14th Amendment to the United States Constitution in authorizing imposition of a warehouseman's lien upon goods placed in storage and the enforcement of said lien in the event of default in payment of the storage charges and further that as a matter of law the requisite state action required under the 14th Amendment is lacking.

Dated: New York, New York
September 19, 1974

Respectfully submitted,

s/ Alvin Altman
BRODSKY, LINETT
& ALTMAN

AFFIDAVIT OF HENRY FLAGG IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HENRY FLAGG, being duly sworn, deposes and says:

1. I am a defendant in the above action and President of the corporate defendant FLAGG BROTHERS, INC. I have personal knowledge of all of the facts and circumstances recited herein. I submit this Affidavit in opposition to plaintiffs' motion for summary judgment and in support of a cross motion for dismissal of the complaints for failure to state a claim upon which relief can be granted.

2. Defendant FLAGG BROTHERS, INC. is a New York corporation engaged in the business of household moving and storage. It maintains an office and place of business at 174 West Lincoln Avenue, Mount Vernon, New York. It holds a Certificate No. NYC 826 issued by the Department of Transportation of the State of New York.

AS TO BROOKS CLAIM

3. On June 13, 1974 I was requested by James A. Levister, City Marshall of the City of Mount Vernon to accompany him to 33 North Third Avenue, Mount Vernon, New York for the purpose of making arrangements to remove the belongings of SHIRLEY BROOKS, the plaintiff herein, from her apartment in the said building to the sidewalk in front of said building. The plaintiff BROOKS was being evicted from her apartment pursuant to a

court order. My initial objective in visiting the apartment at that time was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. In doing so, I was acting solely on behalf of the landlord through the Marshall.

4. On the date and time above specified in my presence the plaintiff BROOKS advised the City Marshall that she could not satisfy the judgment and accordingly the Marshall instructed the defendant FLAGG BROTHERS, INC. to proceed with the removal. My sole function at that time was at the direction of the City Marshal to act for the owner of the premises in effecting the removal of the plaintiff's belongings from her apartment to the sidewalk. That was the sum and substance of my job.

5. Upon realization that her possessions, if nothing further were to be done, would be left on the sidewalk, the plaintiff BROOKS then asked me whether I could arrange to move said furnishings to a warehouse for the purpose of storage. I stated that FLAGG BROTHERS, INC. maintains storage space and could accomodate the plaintiff at our usual rates in both the transporation and storage. I further specified to plaintiff BROOKS that she would have to pay the transportation charges together with accessorial charges for the removal from the sidewalk to the warehouse and in addition pay the storage charges. She requested an estimate and I gave her an oral estimate of $200 solely for the transportation phase of the job based upon a six hour moving job including loading and unloading. This charge was calculated upon our rates of $28 per hour for a van and three men and upon an estimate of a number of barrels and cartons to be used on the job. I further explained that her furnishings would be loaded into three containers for storage purposes; that our storage rates were $25 per month per container and consequently the entire monthly charge would be $75 per month. I explained to the plaintiff that the storage

charges did not run on a 30-day basis, i.e. from June 13, 1973 to July 12, 1973, but that industry practice was to charge for a full calendar month no matter what day of the month the storage was placed and the $75 charge therefor carried her until June 30, 1973; that on July 1, 1973 an additional $75 would be due for the period up until July 31, 1973. The plaintiff was well aware of all of these facets of the transaction at the time she authorized us to store her goods, and I might add that she was extremely pleased that we could and would store her goods. The alternative was leaving plaintiff's goods on the sidewalk after execution of the eviction order. The plaintiff BROOKS agreed to the above arrangement and at her specific direction we moved her furnishings to storage on June 13, 1973. Plaintiff paid $178 at that time on account.

6. A few days thereafter the plaintiff came to our office where she was given a Bill of Lading, annexed hereto as Exhibit "A". The Bill of Lading specifies each of the charges which were incurred in the removal. The Bill of Lading specifically sets forth storage charges of $75 per month. In addition, the plaintiff was given a Household Goods Descriptive Inventory List, annexed hereto as Exhibit "B", which sets forth the nature of her belongings placed in storage. We have used this type of documentation in eviction instances rather than a warehouse receipt. The same information is recorded in both events.

7. At the end of June plaintiff telephoned me and for the first time expressed dissatisfaction with the monthly storage charge agreement. She further indicated that she would not be able to remove her belongings in the month of July. Plaintiff again called sometime in July and arranged with my secretary for an August removal date from storage. At that time she would have owed $156 (shown as the balance due on Exhibit "A", Bill of Lading) plus $150 for two months of storage (July and August, 1973).

8. Having received no additional payment of August 22, 1973, I sent the plaintiff a note requesting payment, attached as Exhibit "C", together with a Final Notice, attached as Exhibit "D".

9. Notwithstanding commencement of preliminary steps, we did not avail ourselves of the remedy of foreclosure of our Warehousemen's Lien as provided under the Uniform Commercial Code. Instead, pursuant to an agreement between the attorneys, we permitted the plaintiff to remove her goods from the warehouse on January 24, 1974 without payment of any charges for storage. In point of fact, the only amount the plaintiff paid was $178 as an advance against the transportation service incurred back on June 13, 1973 at the time of the removal of her belongings from the sidewalk to the warehouse.

10. The facts demonstrate that the plaintiff authorized and indeed encouraged our taking possession of her belongings for storage; that prior to our taking possession the rates and charges were fully explained to her and that she understood and consented thereto; that the Household Goods Descriptive Inventory List specifies three boxes to be stored and that the Bill of Lading specifies storage charges of $75 per month. There was agreement as to the charges at the time plaintiff urgently needed our services to safeguard her property; disagreement on part of plaintiff only occurred conveniently after the safety of her property was realized.

AS TO JONES CLAIM

11. On November 26, 1973 I accompanied the City Marshall to 353 Mundy Lane, Mount Vernon, New York to the apartment of the plaintiff GLORIA JONES who was being evicted pursuant to court order on that day. Again, the purpose of my visit was to determine the manpower needs for and the

time of the actual removal of plaintiff's goods from the apartment to the sidewalk. Also, again in so doing I was acting solely on behalf of the landlord through the City Marshall.

12. Plaintiff Jones called the Department of Social Services for the purpose of obtaining funds to pay the overdue rent and thereby satisfy the judgment. She told us that the request was refused, but that the Department would pay for the transportation of her belongings to our warehouse and for one month's storage. I confirmed this. I advised Mrs. Jones that her belongings would be stored in three (3) crates at a storage rate of $25.00 per crate per month and further that after the Department ceased storage payment, it would be her obligation. She stated that her belongings would not be in storage more than a month because she had another apartment ready for her occupancy.

13. Plaintiff Jones' statement on page 2 of her affidavit that she did not authorize Flagg Brothers, Inc. to storage her property is absurd. We loaded her belongings from her apartment to the truck in her presence and with her approval. If the loading was being done against her will or without her authorization, she could have called the authorities to stop us. The fact is she was present; she knew what was going on; and she requested us to perform the job that was going on.

14. Attached hereto as Exhibit "E", is a letter dated December 13, 1973 from the Department of Social Services to Flagg Brothers, Inc. authorizing payment of one month's storage charges for Mrs. Jones, and as Exhibit "F" a copy of a letter dated January 31, 1974 from the Department of Social Services to Mrs. Jones advising that it would not pay her storage charges thereafter incurred.

15. A Bill of Lading was issued on November 26, 1973 together with a Household Goods Inventory List specifying the

property of Mrs. Jones taken into storage. The storage charges are likewise specified on the Bill of Lading. These documents are annexed hereto as Exhibits "G" and "H" respectively.

16. Attached to plaintiff Jones' affidavit is Exhibit "A", purporting to be a notice which it is not. I do not know who prepared the original. It appears to be a scrap of paper showing the charges she owed as of March 31, 1974, i.e. a total of $335.00. This represents three months' storage at $75.00 per month, a platform charge for removal of $75.00 (this is the customary labor charge for transferring the storage lot from its place in the warehouse to the dock for pickup) and a $35.00 auctioneer's fee.

17. At no time did we advise Mrs. Jones that her storage bill was $600.00 or $500.00 or anything other than the actual amount incurred as of the date the information was given. I believe that she is confused and has included those figures the cost of actually moving her belongings from the warehouse to her new apartment together with the storage charges.

18. The fact is that from January 1, 1974 through September 30, 1974, Mrs. Jones owes Flagg Brothers, Inc. seven (7) months' storage at $75.00 per month, a platform charge of $75.00, and an auctioneer's fee of $35.00 making a total of $635.00.

19. On three occasions Mrs. Jones advised me that she would pay her storage bill for release of her goods, and we brought her storage lots to the platform on a day and hour specified by her, and on none of those occasions did she appear. This necessitated double labor by our employees for each occasion. See letter of my attorneys dated June 28, 1974 to Mrs. Jones' attorneys attached to her affidavit as Exhibit "E".

20. Mrs. Jones agreed to our charges and authorized us to

remove her belongings for storage. As long as she was of the belief that the Department of Social Services would pay for her charges, there was no dispute. After the Department notified her it would no longer pay the charges, Mrs. Jones decided that they were unreasonable.

WHEREFORE, it is respectfully prayed that plaintiff's motion for summary judgment be denied and that defendant's cross motion to dismiss for failure to state a cause be granted in all respects.

s/ Henry Flagg
HENRY FLAGG

Sworn to September 19, 1974

EXHIBITS TO AFFIDAVIT

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EXHIBITS A, B, C, D

(Reproduced as Exhibits A, G, B, and C to Verified Complaint (Class Action) respectively, this Appendix, *supra.*)

EXHIBIT E — SOCIAL SERVICES LETTER OF DECEMBER 13, 1973

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES
DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

December 13, 1973

Flagg Brothers Moving & Storage
41 East 3rd Street
Mount Vernon, N.Y.

RE: Gloria Jones
353 Mundy Lane
Mount Vernon, N.Y.

Dear Sir:

Please be advised that we are only authorizing payment for one month's storage of client's furniture (11/26/73 thru 12/25/73). We will not be held responsible for any costs incurred if furniture is left in storage beyond this period.

Yours truly,

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

s/ C. Cookman
(Mrs.) C. Cookman
Employment Worker

EXHIBIT F — SOCIAL SERVICES' LETTER OF JANUARY 31, 1974

January 31, 1974

Ms. Gloria Jones
% G. Godwin
616 East Lincoln Avenue
Mount Vernon, N.Y.

Dear Ms. Jones:

Please be advised that the approval for the storage of your furniture has expired. We have no responsibility for your furniture, storage and or other fees.

This Agency will not be involved in relocating you into an unfurnished apartment. We recommend that you locate a furnished apartment or a furnished room.

Yours very truly,

DIVISION OF FAMILY AND
CHILD SOCIAL SERVICES

s/ C. Cookman
(Mrs.) C. Cookman
Employment Worker

CC: Flagg Brothers
CC/ew

G. Jones
Has to get in touch w/DSS

Combined Uniform Household Goods Bill of Lading and Freight Bill — New York Commercial Zone.

Pd 2/4/74

FLAGG BROS. TRUCKING SERV., INC.

N.Y.C.—M.T. No. 4½ EAST THIRD STREET MOUNT VERNON, N.Y. 10550

Phone 668-9261

4575-84 (8)

DSS Not Paying Any More

NAME Gloria Jones Tel.

FROM 353 Lundy Lane Apt.

Mt. Vernon, N.Y.

TO Storage Apt.

OTHER STOPS

MOVING DATE 11/26/73 DAY Monday TIME A.M. P.M.

TIME RECORD

Start 11 A.M. P.M. Customer Initials

Finish 6 A.M. P.M. Customer Initials

JOB HOURS 7

TRAVEL TIME ½

TOTAL HOURS 7½

MOVING RATE: 1 VANS 3 MEN @ $ 28.57 Per Job Hr., Plus ½ Hrs. Travel Time

ESTIMATE OR REMARKS

(Approx. estimate—packing date—Instructions on job—or other info.)

Dept. of Social Service

Mt. Vernon, N.Y.

Ms. Cookman

VALUATION

Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 (.) cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT

(SIGN BEFORE START OF ANY SERVICE)

The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Gloria Jones

By:

MOVER: FLAGG BROS. TRUCKING SERV., INC.

By:

DELIVERY RECEIPT

Except as specific[illegible]ed hereon
All services and All article[illegible]n Good Condition

CUSTOMER: Gloria Jo[illegible]

By:

RATES and DESCRIPTION		CHARGES	
MOVING 7 hours @ $ 28.57 per hr.		196	00
OVERTIME hours @ $ per hr.			
CARTAGE cu. ft. @ $ per cu. ft.			
WEIGHT lbs. @ $ per lb.			
PIANO CHGS.			
OTHER Travel time		14	00
Barrels, packed @ $ each			
13 Barrels, loaned @ $ .30 each		39	00
Wardrobes @ $ each			
Cartons or boxes @ $ .57 each			
4 Matt Cartons @ $ 6.00 each		24	00
Other fumigating		2	00
Whse. Labor chgs.			
Storage chgs.		75	00
Other			
Insurance; shipper declares the full value of the shipment for the purpose of insurance to be: Amt. $ @ $ per $100.00			
TOTAL CHARGES		$ 356	00
Advance Deposit			
BALANCE DUE			

RECEIVED PAYMENT

MOVER FLAGG BROS. TRUCKING SERV., INC.

By

MOVER'S (Carrier) COPY TO BE RETAINED BY MOVER

TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.

FORM 252A MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

EXHIBIT G — BILL OF LADING (G. JONES)

107a

CONTRACTOR OR CARRIER

HOUSEHOLD GOODS DESCRIPTIVE INVENTORY

PAGE NO. | NO. OF PAGES

AGENT: Flagg Bros., Inc.

CARRIER'S REFERENCE NO.

OWNER'S GRADE OR RATING AND NAME: Gloria Jones

CONTRACT OR GBL NO.

ORIGIN LOADING ADDRESS: 353 Mundy Lane, Mt. Vernon, N.Y. | CITY | STATE

GOVT. SERVICE ORDER NO.

DESTINATION

VAN NUMBER

EXCEPTION SYMBOLS

BE-BENT, BR-BROKEN, BU-BURNED, CH-CHIPPED, CU-CONTENTS ? CONDITION UNKNOWN, D-DENTED, F-FADED, G-GOUGED, L-LOOSE, M-MARRED, MI-MILDEW, MO-MOTHEATEN, PBC-PACKED BY CARRIER, PBO-PACKED BY OWNER, R-RUBBED, RU-RUSTED, SC-SCRATCHED, SH-SHORT, SO-SOILED, T-TORN, W-BADLY WORN, Z-CRACKED

LOCATION SYMBOLS

1. ARM, 2. BOTTOM, 3. CORNER, 4. FRONT, 5. LEFT, 6. LEGS, 7. REAR, 8. RIGHT, 9. SIDE, 10. TOP, 11. VENEER

NOTE: *The omission of these symbols indicates good condition except for normal wear.*

ITEM NO.	CR. REF.	ARTICLES	CONDITION AT ORIGIN	EXCEPTIONS (IF ANY) AT DESTINATION
1	1	Dining table		
2	1	air conditioner		
3	1	stove		
4	1	refrigerator		
5	1	stereo		
6	1	kitchen cabinet		
7	3	rugs / padding		
8		record stand & records		
9		vacuum cleaner		
0		ironing board		
1		Lamps		
2	16	Barrels CU		
3		boxes CU		
4		Straw loveseat		
5	2	chairs		
6	2	end tables		
7	6	dining chairs	(4 Containers)	
8	1	coffee table		
9	1	club chair		
0	1	sofa		
1	1	break Front		
2	3	dressers		
3	4	nite stands		
4	4	lamps shades		
5	1	headboard		
6	4	pc. marbles		
7	2	mirrors		
8	2	boxsprings		
9	2	mattresses		
0		Long pole(not in Harrison)		

ITEM NO.	REMARKS/EXCEPTIONS

"We have checked all the items listed and numbered 1 to ____ inclusive and acknowledge that this is a true and complete list of the goods tendered and of the state of the goods received."

INVENTORY NUMBER

AT ORIGIN	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE	AT DESTINATION	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE
	OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE		OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE

AFFIDAVIT OF HENRY C. BRENGEL, JR. IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

HENRY C. BRENGEL, JR., being duly sworn, deposes and says:

1. I am president of the New York State Movers and Warehousemen's Association, Inc., a non-profit membership corporation of the State of New York comprised of approximately 250 movers and warehousemen certificated to transport household goods either in intrastate commerce by the New York Department of Transportation or in interstate commerce by the Interstate Commerce Commission, or by both agencies. Approximately 98% percent of our members maintain warehouses for storage of household goods.

2. I am also president of Empire Storage Warehouse, Inc. located at 80 Duffy Avenue, Hicksville, New York, a certificated carrier of household goods in intra and interstate commerce. We have been in the business since 1904. We maintain a warehouse for the storage of household goods approximately 20,000 square feet in size at the above address and operate 14 pieces of equipment. I have 30 years experience in the moving and storage business and am fully knowledgeable of all of its phases.

3. The purpose of this affidavit is to apprise the Court of the industry practices in the storage of household goods with respect to all facets of an operation from the initial contact of the warehouseman to the final disposition of the storage lot in the event of foreclosure.

Affidavit of Henry C. Brengel, Jr. in Support

4. Although the exhibits annexed represent documentation of my company, the forms and procedures specified herein are typical of those utilized generally in the moving and storage industry.

5. When we are contacted by a customer who wants to storage his household effects we initially send a salesman to make a survey and give an estimate. Our charges are made upon a cubic foot basis. A copy of our estimate form is annexed as Exhibit "A".

6. If the customer decides to use our service the driver takes a storage contract with him on the day of the move for execution by the depositor. The storage contract which is annexed as Exhibit "B" provides the exact storage rates.

7. Upon receipt of the household effects at the warehouse we prepare an inventory list or warehouse receipt containing an itemization of the depositor's belongings. This document is annexed as Exhibit "C". The list is normally send to the customer a few days after his belongings have been stored.

8. We have been engaged by the Marshall of the District Court of Nassau County to effect evictions from apartment to sidewalk pursuant to court order. In those instances a local moving ticket is used for the apartment to sidewalk move and given to the Marshall. On these occasions we have been requested by the owner of the property to storage it at our warehouse instead of leaving it on the sidewalk. My driver takes a storage contract with him on these evictions anticipating such a storage request. The contract is executed by the owner at that time (Exhibit "B") and the inventory list (Exhibit "C") is sent a few days later. The procedure and documentation in essence is the same in the eviction storages as in the usual storage situations.

9. Normally after two months delinquency in payment of storage charges we begin to contact the customer for payment. We do not invoke the foreclosure provisions of the Uniform

Affidavit of Henry C. Brengel, Jr., in Support

Commercial Code for approximately 9 months to one year after non-payment. Then we follow the enforcement steps of the Section 7-210 of the Code to the letter in fact, we send not only the notice required under Section 7-210(2), (Exhibit "E"), but an additional notice form which is not required (Exhibit "F"). We also send the notices by registered or certified mail as required and additionally by regular mail which is not required. The reason for this dual mail use is to make absolutely certain the depositor receives the notice of sale in the event the registered or certified mail is not forwarded to a different address than that which was given to us.

10. The warehouseman does not resort to the sale of a depositor's belongings lightly. When he is ultimately required to because of a continuing and unremitting delinquency in payment by the depositor resulting in the non remunerative use of warehouse space, the industry practices following the Uniform Commercial Code insure ample notice and opportunity to protest. If the storage charges are in dispute, although it is difficult to contemplate such to be the case bonafidely since the charges are detailed in the contract, we would not sell if the depositor tendered the amount he believed to be owing because of the risk of being held liable for conversion under the Code.

s/ Henry C. Brengel, Jr.
HENRY C. BRENGEL, JR.

Sworn to October 2, 1974

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EXHIBITS TO AFFIDAVIT

LOCAL MOVING & STORAGE ESTIMATE

AGENT FOR: NORTH AMERICAN VAN LINES, INC.

80 DUFFY AVENUE
HICKSVILLE, N. Y. 11801

(516) 931-0010

Empire Storage WAREHOUSE INC

Local & Long Distance Moving
Storage — Packing
Rug Cleaning

Date of Estimate..... Packing Date..... Moving Date..... Phone.....

Name..... To .....

Address ..... Floor..... | Address..... Floor .....

City..... Apt..... | City..... Apt. .....

LOCAL MOVING PROPOSAL

Furnish .....Van and.....Men for.....Hours at.....Per Hour.

Extra Pickup-Drop Off - At ..... $.....

Piano (type)..... .....

Insurance $.....Valuation at $.....per hundred dollars .....

Other Services..... .....

STORAGE PROPOSAL

TOTAL $.....

CARTAGE TO WAREHOUSE { (In-Out).....Men for.....Hours at $.....per hour .....

WAREHOUSE LABOR { .....Lbs. at.....$.....per Lb. .....

.....Cu. Ft.....At $.....per Cu. Ft. .....

STORAGE { .....Lbs. at $.....per hundred per month .....

.....Cu. Ft. at $.....per cu. ft. " " .....

Insurance.....Valuation at $.....per hundred per month .....

Wrapping..... .....

Other Services..... .....

TOTAL $.....

REMARKS

The charges indicated herein are estimated charges only. I understand that all charges are subject to actual time plus travel or actual weight, whichever is applicable. I further understand that unless a greater value is declared herein by me, my goods are released to the carrier at a valuation of 30¢ per pound per article. I hereby agree to pay all charges by cash, certified check or money order upon delivery of my goods.

X

SHIPPER

MOVER

Date

PACKING PROPOSAL

.....Barrels at $..... per $.....

.....Carton 1½ cu. at $..... per .....

.....Carton 3 cu. at $..... per .....

.....Carton 4 cu. at $..... per .....

.....Carton 6 cu. at $..... per .....

.....Mattress ctn. at $..... per .....

.....Mattress bags at $..... per .....

.....Wardrobes at $..... per .....

.....Mirror ctn. at $..... per .....

TOTAL $.....

All charges must be paid in cash, money order, or cashier's check on delivery.

Form 257-S

MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N. Y. 11735

EXHIBIT A — ESTIMATE FORM

CONTRACT FOR MOVING AND STORAGE SERVICES New York Standard Form—NYFWA Approved 1/54

WEIls 1-0010

EMPIRE STORAGE WAREHOUSE, Inc.

Storage-Local & Long Distance Moving-Packing-Crating-Shipping

80 DUFFY AVE. HICKSVILLE, L. I.,N. Y.

.....19.....

The customer designated below agrees to hire the above named company herein after referred to as the company and the company agrees to perform the services designated below at the price specified in this contract and subject to the terms and conditions printed on the reverse side which are made a part hereof.

The following service or services are to be performed for the account of

on.....19..... A.M. .....P.M. Preliminary Packing Date.....19..... .....A.M. .....P.M.

From.....Apt.....El. ☐ Phone.....

To.....Apt.....El. ☐ Phone.....

Goods to be stored at

Final charges to be determined by actual cubic measurement.

Estimated as follows:

STORAGE.....cu. ft. @.....¢ per cu. ft. per mo.

Silver.....

Vault Stge. per mo. $..... Rugs.....

Books.....

Piano Stge. per mo. $..... Grand.....

Upright.....

Cartage in .....cu. ft. @.....¢ per cu. ft.

Labor in.....cu. ft. @.....per cu. ft.

Piano cartage $..... Hoist chge. $.....

SPECIAL REMARKS.....

MOVING RATES: 8 A.M. to 5 P.M. Monday to Friday (Except Holidays)

.....Van and.....men @ $.....per hour

OVERTIME RATES:

.....Van and.....men @ $.....per hour

.....Hour traveling time will be charged each way to and from the job.

TERMS:—Cash. Driver will collect

Time Start.: .....A.M. .....P.M. Cus. Sig.....

Time Fin.: .....A.M. .....P.M. Cus. Sig.....

PACKING MATERIAL: RENTALS OR FURNISHING — RUG CLEANING — FUMIGATION

Estimated quantities — charge to be made for material actually used.

.....Barrels @ $.....Each	Book ctns. @ $.....Each	Misc......
.....Wardrobes @ $.....Each	Lamp Shade ctns.....Each	.....
.....Boxes @ ¢.....Each	Matt. ctns. @ $.....Each	.....
.....Crates @ $.....per cu. ft.	Paper & Pad @ $.....Each	.....

RUGS: Dust clean. @.....¢ per sq. ft.....Shampoo @.....per sq. ft.....Moth Proof @.....¢ per sq. ft.....

SPECIAL REMARKS.....

Rates are based on, and this contract is subject to the limits of liability set forth on reverse side of contract, unless excess valuation is declared herein and itemized list is furnished in writing by the customer and attached hereto.

TOTAL EXCESS VALUATION $..... @ $..... PER $100 . . . TOTAL $.....

It is agreed that this contract which includes terms and conditions printed on the reverse side hereof, shall constitute the entire agreement between the parties and no statement or promise not contained herein shall be binding or valid.

I have read this contract and the terms and conditions on the reverse side hereof and agree to all the said terms and conditions and acknowledge receipt of copy herewith.

Accepted for the Company

EMPIRE STORAGE WAREHOUSE, Inc.

By.....

.....
Customer's or Agent's Signature

.....
Permanent Address

SEE REVERSE SIDE FOR TERMS, CONDITIONS AND LIMITS OF LIABILITY.

HILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N. Y 11735 FORM 248

The customer and the company agree to the following terms and conditions:

1. OWNERSHIP OF PROPERTY: The customer has represented and warranted to the company that he is the legal owner or in lawful possession of the property and has the legal right and authority to contract for services for all of the property tendered, upon provisions, limitations, terms and conditions herein set forth and that there are no existing liens, mortgages or encumbrances on said property. If there be any litigation as a result of the breach of this clause customer agrees to pay all charges that may be due together with such costs and expenses including attorneys fees which this company may reasonably incur or become liable to pay in connection therewith and this company shall have a lien on said property for all charges that may be due them as well as for such costs and expenses.

2. PAYMENT: Storage accounts are due and payable monthly in advance. Interest will be charged on accounts unpaid for a period of three months after they become due. The company has a lien on all goods moved or stored to secure payment for charges for all services rendered. All charges must be paid in cash, money order, or certified check before delivery or transfer of goods deposited under this contract and no transfer of title will be recognized unless entered on the books of this company.

3. LIABILITY OF THE COMPANY. (a) The company when transporting to or from the warehouse for permanent storage acts as a private carrier only, reserving the right to refuse any order for transporting and in no event is a common carrier.

(b) This contract is accepted subject to delays or damages caused by war, insurrection, labor troubles, strikes, Acts of God or the public enemy, riots, the elements, street traffic, elevator service or other causes beyond the control of the company.

(c) The company is not responsible for any fragile articles injured or broken, unless packed by its employees and unpacked by them at the time of delivery and in no event shall the company be liable except for its own negligence. The company will not be responsible for mechanical or electrical functioning of any article such as but not limited to, pianos, radios, phonographs, television sets clocks barometers, mechanical refrigerators or air conditioners whether or not such articles are packed or unpacked by the company.

(d) No liability of any kind shall attach to this company for any damage caused to the goods by inherent vice, moths, vermin or other insects, rust, fire, water, deterioration or normal wear and tear.

(e) Unless a greater valuation is stated herein, the owner declares that the value in case of loss or damage whether arising out of storage, transportation, packing, unpacking, fumigation, cleaning or handling of the goods, and the liability of the company for any cause for which it may be liable for each or any piece or package and the contents thereof does not exceed and is limited to FIFTY DOLLARS ($50.00) or for the entire contents of each van or storage lot does not exceed and is limited to TWO THOUSAND DOLLARS ($2000.) upon which declared or agreed value the rates are based, the owner having been given the opportunity to declare a higher valuation without limitation in case of loss or damage from any cause which would make the company liable and to pay the higher rate based thereon, and in no event however shall the company be liable except for its own negligence.

(f) In the event the company shall be requested by the customer to engage the services of others with respect to the transportation, repair, cleaning or servicing of any article, the company shall act as agent for the customer and shall not be liable for any damage arising out of such services rendered by others and shall not be liable for failure to execute any instructions except for such instructions that are in writing and acknowledged in writing by the company. In the event goods are delivered to another carrier, the company shall not be liable for loss or damage for any cause to said goods unless exception is noted in writing on the Delivery Receipt of this Company when delivery is made.

(g) The company shall not be responsible for loss of or damage to any article contained in drawers, or in packages, cases or containers not packed and unpacked by the employees of the company unless such containers are opened for the company inspection and then only for such articles that are specifically listed by the customer and are receipted for by the company or its agent.

(h) In no event shall the company be responsible for loss or damage to documents, stamps, securities, specie or jewelry unless a special agreement in writing is made between the customer and the company with respect to such articles.

4. MINIMUM PERIOD FOR STORAGE: On storage accounts three months storage will be charged for any fraction of the first three months period. Thereafter one months storage rate will be charged for thirty days or less.

5. TERMINATION OF STORAGE: The company reserves the right to terminate storage of the goods at any time by giving the depositor thirty days written notice of its intention to do so and unless the depositor removes such goods within that period the company is hereby empowered to have the same removed at the cost and expense of the depositor. And upon so doing the company shall be relieved of any liability with respect to such goods therefore or thereafter incurred.

6. ADDRESS AND CHANGE: It is agreed that the address of the depositor of goods for storage is as given on the front side of this contract and shall be relied upon by the company as the address of the depositor until change of address is given in writing to the company and acknowledged in writing by the company and notice of any change of address will not be valid or binding upon the company if given or acknowledged in any other manner.

7. TIME FOR FILING CLAIM: (a) As a condition precedent to recovery, claims must be filed in writing with the company within ten days after delivery of property and suit or arbitration must be instituted within six months from the day when notice in writing is given by the company to the customer that the company has disallowed the claim or any part thereof.

(b) Where claims are not filed nor suit or arbitration instituted in accordance with the foregoing provision, the company shall not be liable and such claims will not be paid.

(c) The company shall have the right to inspect and repair alleged damaged articles.

8. GENERAL TERMS AND CONDITIONS: (a) If goods cannot be delivered in the ordinary way by stairs or elevator, the owner agrees to pay an additional charge for hoisting or lowering or other necessary labor to effect delivery. Customer shall arrange in advance for all necessary elevator and other services and any charges for same shall be met by the customer. Customer agrees to pay the hourly charge in this contract for waiting time caused by lack of sufficient elevator service.

(b) Packing or moving charges do not include the taking down or putting up of curtains, mirrors, fixtures, pictures, electric or other fittings, or the relaying of floor coverings or similar services but if such services are ordered a charge will be made therefor.

(c) Company will charge for labor and materials supplied on all access to goods in the warehouse.

(d) Platform charge will be made when goods are delivered to an outside truckman.

9. CORRECTION OF ERRORS: The depositor agrees that unless notice is given in writing to the company within ten days after the receipt of the inventory list accompanying the warehouse receipt and made a part thereof including any exceptions noted thereon as to the condition of the property when received for storage, the inventory list shall be deemed to be correct and complete.

10. CONTROVERSY OF CLAIM: Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claims be found in tort or contract shall be settled by arbitration law of the State of New York and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

11. AGREEMENT: The contract represents the entire agreement between the parties hereto and cannot be modified except in writing and shall be deemed to apply to all the property whether household goods or goods of any other nature or description which the company may now or any time in the future store, pack, transport or ship for the owner's account.

113a

EXHIBIT C — WAREHOUSE RECEIPT FORM

WAREHOUSE RECEIPT

TERMS AND CONDITIONS

The customer and the company agree to the following terms and conditions:

STORAGE RATES DO NOT INCLUDE INSURANCE

Warehouse Receipt

Non-Negotiable

LOT NO.

ISSUED BY

Empire Storage Warehouses

Storage - Local & Long Distance Moving
Packing - Crating - Shipping
80 DUFFY AVENUE
HICKSVILLE, L.I., N.Y. 11801
Phone: (516) 931-0010

WAREHOUSE RULES

PLEASE READ

Present this Warehouse Receipt and a written order when any goods are to be withdrawn.

Reasonable notice is required for access to or delivery of goods.

Access to goods by appointment only.

A labor charge will be made for handling of and access to goods in the warehouse.

This Warehouse Receipt must be returned when all goods enumerated in the Schedule are to be withdrawn.

A platform charge will be made when goods are delivered to outside truckmen.

The final settlement of this account must be made in CASH, at this office. No checks will be accepted, upon withdrawal of goods unless certified.

FROM SIDE

DELIVERY RECEIPT

EMPIRE STORAGE WAREHOUSE Inc.

The undersigned hereby acknowledges the delivery and receipt of all property as listed and described in this warehouse receipt and/or any supplement thereto, except as noted herein. I further certify that all property so delivered is owned by me and the said delivery to me includes all property stored by the undersigned except as otherwise indicated herein in writing.

Signed _____

Customer or Agent's Signature

Date _____

ORDER FOR DELIVERY

EMPIRE STORAGE WAREHOUSE Inc.

Kindly deliver goods on this warehouse receipt to

_____

_____ on _____

_____

In case goods are delivered to truckmen other than the Company's Trucks, the responsibility of the Warehouse ceases when goods are delivered to said truckmen.

Goods for places where receipts are customarily refused or where no authorized person is present to sign for them, may be left at my risk.

Date _____ Signed _____

Customer or Agent's Signature

MEMBER OF

Empire Storage WAREHOUSE

Storage - Local & Long Distance Moving
Packing - Crating - Shipping
80 DUFFY AVENUE HICKSVILLE, L.I., N.Y. 11801
Phone: (516) 931-0010

Lot No. ..... Date of Issue ....., 19....

RECEIVED for the account of .....

for storage, the goods or packages enumerated below, and subject to the terms and conditions on the reverse side of this receipt, said goods stored in warehouse located at No. .....

EMPIRE STORAGE WAREHOUSE Inc.

By _____

Hall

DESCRIPTIVE SYMBOLS	EXCEPTION SYMBOLS	LOCATION SYMBOLS
B/W - BLACK & WHITE TV C - COLOR TV CP - CARDED PIECES PWC - PACKED BY OWNER T/ - CARTON DISASSEMBLED TWD - DISASSEMBLED BY OWNER PB - PROFESSIONAL BOOKS PL - PROFESSIONAL LIBRARY PP - PROFESSIONAL PAPERS	BE - BENT CR - CRACKED DN - DENTED CO - CHIPPED CU - CRATED & CON- TENTS UNKNOWN B - BROKEN F - FADED R - RUSTED L - LEAKS M - MARKED WT - WELDED WD - WATER STAINED O - OLDED RU - RUSTED SC - SCRATCHED SM - SMOKY SS - SPILLED T - TORN W - WORN OUT WHEN D - DAMAGED	1. ARM 2. BOTTOM 3. CORNER 4. FRONT 5. LEFT 6. LEGS 7. ROOF 8. RIGHT 9. SIDE 10. TOP 11. WINDOW 12. OTHER

NOTE: THE OMISSION OF THESE SYMBOLS INDICATE GOOD CONDITION EXCEPT FOR NORMAL WEAR.

SCHEDULE OF GOODS

IMPORTANT

Are your goods insured against fire?

Read your policy and see that it covers the goods in the building in which they are stored.

If not correct, please notify immediately.

SALE·NOTICE

LOT NO.····· ·····19

TO ····· ·····

····· ·····

····· ·····

Please take notice that in accordance with the Uniform Commercial Code has a lien upon the goods stored with it by you in your name or on your account (or in which you claim an interest).

An itemized statement of the claim showing the amount now due and the date or dates when it becomes due as follows:

The goods against which the lien of this Company exists consists of all personal and other property as scheduled in the storage warehouse receipt issued to you and numbered ····· and stored by you in your name or on your account in the warehouse of this Company.

We hereby demand that the amount of such claim as above stated and of such further claims as shall accrue shall be paid on or before the····· day of ····· If such claim is not paid within the time above specified the goods will be duly advertised for sale and sold at public auction at ····· on····· the ····· day of ····· 19···· commencing 10:30 A.M.

The proceeds of such sale will be applied to the payment of said lien, including the reasonable charge for notice, advertisement and sale; and in case any DEFICIENCY shall arise on said sale YOU WILL BE LIABLE THEREFOR and judgement be entered against you.

If for any reason the sale shall not be completed on the said date it will be continued on each succeeding····· at the same time and place until all the goods are sold or until the lien is satisfied.

In the event the above described property belongs to any person in the United States Services, in any capacity, notify our office immediately by registered mail, advising us the rank, file or division of service, so that adequate protection will be preserved for the interest of the party or parties in the United States Government service.

BY ·····

EXHIBIT F — FINAL NOTICE

FINAL NOTICE

.....*19*...

_____

_____

_____

.....

Your Storage Account, amounting to $..... is now seriously overdue, and we herewith request that you make a payment on same on or before .....

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours,

(Read other side)

DEFENDANTS' RULE 9(g) STATEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern and Eastern Districts of New York, defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, the opposing parties to plaintiffs' motion for summary judgment, submit the following statement of the material facts as to which it is contended that there exists a genuine issue to be tried:

A. The Brooks' Complaint

1. Whether plaintiff BROOKS' arrangement with defendant HENRY FLAGG for the removal and storage of her belongings was entered of her own accord or as a result of misleading representations.

2. The moving and storage rates the defendant FLAGG quoted to plaintiff BROOKS. Prior to removing her goods plaintiff BROOKS claims she was given a total charge of $65.00 for the moving and storage of her goods. Defendant HENRY FLAGG claims his company gave an estimate of $200.00 for the transportation phase of the job based upon an hourly rate for $28.00 for a van and 3 men and an estimate of the number of barrels and cartons to be used, plus $75.00 a month for storage.

3. Whether there was agreement between the plaintiff BROOKS and defendants as to the moving and storage rate.

4. Whether the plaintiff BROOKS' belongings were loaded by and transported to warehouse at the specific request of said plaintiff.

Defendants' Rule 9(g) Statement

5. Whether defendant FLAGG advised plaintiff that storage charges run for a calendar month, i.e., 1st to end of month and not any 30 day cycle, i.e. June 13 to July 13.

6. Whether defendants' charges were reasonable.

B. The Jones' Complaint

7. Whether the removal and storage of plaintiff JONES' belongings by the defendants was authorized by plaintiff.

8. Whether the Department of Social Services of Westchester County authorized defendant to transport plaintiff's goods and store for one month at Department's expense.

9. Whether plaintiff JONES was aware that the Department of Social Services authorized payment for transportation and storage of her belongings for one month.

10. Whether plaintiff JONES was advised that after one month's storage she would have to pay storage charges.

11. Whether plaintiff JONES was advised the rate for storage.

12. Whether defendants misrepresented the amount due and owing them from plaintiff JONES.

13. Whether plaintiff JONES agreed to pay all outstanding storage charges.

14. Whether defendants' charge for storage was reasonable.

Respectfully submitted,

s/ Alvin Altman
BRODSKY, LINETT & ALTMAN

AFFIDAVIT OF RICHARD M. POWELL IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF MARYLAND)
: SS.:
COUNTY OF MONTGOMERY)

RICHARD M. POWELL, being duly sworn, deposes and says that:

1. I am the President of the International Association of Refrigerated Warehouses (IARW). I have held my present position for 16 years. As President of IARW, I am responsible for the planning, organization, staffing, directing, and controlling, subject to broad policy control by the Board of Directors. My knowledge of the industry is based on 16 years of close association with the public refrigerated warehousemen, with their warehousing operations, and with other segments of the food industry which do business with them. I am authorized by IARW to submit this Affidavit.

2. IARW is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is an international trade association for the public refrigerated warehousing industry, having, in the United States, 218 member companies who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. Of the IARW's 218 U.S. member companies, there are 27 warehouses located in the State of New York. The member warehouses account for about 567,000,000 cubic feet of public refrigerated warehouse space which comprises over 75% of the total public refrigerated warehouse space in the United States.

3. The public refrigerated warehouse industry provides storage and distribution services to manufacturers, processors and distributors of products requiring refrigeration. Typically, these products are mostly perishable foodstuffs, but they also embrace various commercial products which require refrigeration such as film, blood plasma, seeds, chemicals and plastics. The refrigerated warehouse provides freezing services as well as storage at a range of temperatures depending upon the nature of the product.

4. One of the principal functions of the public refrigerated warehouse is to provide economical distribution services for producers located throughout the country. Meat products from the Midwest, fruit and vegetables from Texas, fish from the Pacific Northwest, and a multitude of other products will be stored at a public refrigerated warehouse. The warehouse will distribute these products to stores, restaurants, institutions and other receivers in the territory surrounding the warehouse. The services accorded to such goods include break-bulk, consolidation, distribution of pool-cars, cartage, packaging, repairing, sampling, weighing, loading and unloading, and numerous other functions related to the economical storage and distribution of commercial goods.

5. The public refrigerated warehouse relies upon its lien as an essential contractual element in the conduct of its business. The local public refrigerated warehouse deals in a national market. It cannot be fully informed of the credit and status of businesses throughout the country, or, for that matter, the numerous foreign producers that store goods in commercial warehouses. In dealing with customers located in distant areas, it must rely upon the warehousemen's lien for its protection.

6. Producers rely upon public warehouses to permit them to expand into new markets. This is especially true of small, new

producers who must introduce their products into new markets by making test sales. The warehousemen's lien protects the warehouseman when these new products or their producers fail. The lien, however, allows the marketing of these products without the prepayment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies that may often own their own refrigerated warehouses.

7. The public refrigerated warehouse is typically a small, local, privately owned company. The 1967 Census of Business, Public Warehousing, B C 67-WS9, published by the U.S. Department of Commerce, Bureau of the Census, (the most recent publication) indicates that of the 749 refrigerated warehouses then operating, a total of 432 were warehouses of less than 500,000 cubic feet capacity (Table 19). Of these 749 warehouses, only 182 were located in metropolitan areas of 1,000,000 inhabitants or more (Table 17). The remainder were located in smaller communities. In terms of the State of New York with a total of 89 refrigerated warehouses, 22 were located in New York, New York and 6 in Buffalo, New York (Table 1 and Table 17). The remaining 61 warehouses were located in the smaller communities in New York State. Of the 749 refrigerated warehouses, only 142 had annual gross revenues of over $500,000.00 (Table 3). The refrigerated warehouse typically is a small, privately owned company who must deal with large, national corporations. These large food processors, meat packers, etc. have overwhelming resources and large staffs of lawyers and other experts. In disputes between the warehouseman and these large, national corporations, the lien is a vital protection for the warehouseman.

8. The nature of commercial warehousing is such that a steady flow of goods moves through the warehouse. The lien allows the warehouseman to perform essential services for the

goods and to release them prior to payment for such services since the lien is attaching to new goods of the customer that are entering the warehouse. This is a far different situation from the household goods warehouse who receives a person's household goods, stores them and releases them when the charges are paid. The commercial warehouse does not and cannot deal economically with each lot of goods as a separate, distinct unit. It is the existence of the warehousemen's lien that allows the economic free flow of goods through the warehouse.

9. Refrigerated Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they pre-pay freight charges for their customers or accept and pay for collect shipments. The lien allows them to make such payments and the commercial value of such arrangements is important. A food broker in New Jersey may buy a carload of foodstuffs from Texas F.O.B. origin, consigned to a refrigerated warehouse in New York. The warehouse will pay the collect freight charges relying on its lien. Absent the existence of the lien, such commercial flexibility would be difficult. The same situation exists in ordering out goods from a warehouse. A broker receives an order for immediate shipment, telephones the warehouse to ship the freight pre-paid and the warehouse can do so relying for payment upon the lien it has on other of the broker's goods. When dealing with perishable foodstuffs items, it is essential that goods move freely and quickly. The risk of spoilage and deterioration is high. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. The warehousemen's lien facilitates goods moving freely and easily in commerce.

10. There would be an adverse effect upon the nationwide marketing of foodstuffs items if the lien were held

unconstitutional. It is impossible to calculate the increased cost that would result but it would be another cost that would be added to the price of food.

s/ Richard M. Powell
RICHARD M. POWELL

Sworn to September 30, 1974

AFFIDAVIT OF DONALD E. HORTON IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

DONALD E. HORTON, being duly sworn, deposes and says that:

1. I am the President of the American Warehousemen's Association (AWA). I have served as Chief Administrative Officer of the Association since May 1, 1954. As President of AWA, I am responsible for the administration of the various activities of the Association which include, but are not limited to, educational programs for the industry, maintenance of library and reference sources dealing with all phases of physical distribution, handling of industry-customer relations, and industry-government relations. I serve subject to policies set forth by the Association's Board of Directors, as the official spokesman for the industry as represented by the Association.

Affidavit of Donald E. Horton in Opposition to Summary Judgment

I have been associated with the merchandise warehousing industry in various capacities since 1940 and with the American Warehousemen's Association since 1946. During these years it has been possible for me to develop an intimate knowledge of the industry through close association with the principals of merchandise warehousing companies and their customers, through study of their methods and functions, through the gathering and dissemination of statistical data, and through the planning and conducting of seminars and training programs dealing with all aspects of the conduct of the merchandise warehousing business. I have served various Governmental agencies in an advisory capacity in warehousing matters, among these agencies being the Hoover Commission, Department of Defense, General Services Administration, and the Interstate Commerce Commission.

I am authorized by AWA to submit this Affidavit.

2. AWA, established in 1891, is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the only national trade association for the public merchandise warehousing industry. It has 478 members who operate warehouses throughout the United States. Of the AWA's 478 members, there are 18 members located in the State of New York. The member warehouses account for approximately 1,800,000,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States.

3. The merchandise warehouse industry provides storage and distribution services to industrial and commercial accounts. The types of commodities handled by these warehouses range from consumer goods, such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturers' parts, machinery, chemicals, etc. They do not include the storage of used household goods for individuals.

Affidavit of Donald E. Horton in Opposition to Summary Judgment

4. One of the principal functions of merchandise warehousing is to provide storage and distribution services for manufacturers located throughout the country and in foreign countries. A typical merchandise warehouse will be storing a mix of products such as radios from Japan, television sets from Chicago, auto parts from Detroit, office machines from Boston, and a myriad of other products from various manufacturers.

A recent study by Professor Bernard J. La Londe of Ohio State University published by AWA in Warehousing Review, Vol. 2, No. 3, page 5 (May/June 1973), noted the following facts concerning the number of customers and product mix for the public merchandise warehousing industry:

NUMBER OF CUSTOMERS AND PRODUCTS STORED

Total Number of Customers

Total Number of Customers

Number of Customers	1967	1972
10 & Over	11.1%	6.5%
11 - 50	40.8	41.3
51 - 100	25.9	23.9
101 - 250	22.2	23.9
Over 250	-	44
Total	100.0%	100.0%

Affidavit of Donald E. Horton in Opposition to Summary Judgment

Products Stored	Finished Goods: % of Respondents Handling Product	Finished Goods: Space Devoted to Product	Raw Materials: % of Res. Hand. Pro.	Raw Materials: Sp. Devoted to Product
Grocery Products	86.1%	36.6	13.9%	14.0%
Chemicals	70.9	14.5	21.5	37.6
Household Appliances	58.2	11.0	3.8	2.3
Machinery & Industrial Equipment	36.7	3.9	10.1	6.0
Automotive	35.4	5.7	5.1	12.0
Drugs & Health Supplies	32.9	2.8	1.3	1.2
Home Furnishings	26.6	2.6	3.8	2.9
Bldg Supplies/Hardware	24.1	2.2	6.3	2.9
Tobacco Products	20.3	3.5	-	-
Recreation Equipment	17.7	1.8	2.5	2.0
Alcoholic Beverages	13.9	1.3	-	-
Paper Products	12.6	4.7	3.8	12.4
School & Hospital	6.3	.7	1.3	1.2
Other	34.2	8.7	5.1	5.6
Total		100.0%		100.0%

Affidavit of Donald E. Horton in Opposition to Summary Judgment

PERCENT OF PRODUCT STORED WHICH IS FINISHED GOODS

% Finished Goods	% Distribution of Responses
100%	34.2%
75-99	31.5%
50-74	23.7%
25-49	6.6%
Under 25%	4.0%
Total	100.0%

Unweighted Average, Finished Goods: 78.2%

Unweighted Average, Raw Materials: 21.8%

Such goods will be stored under contract with the manufacturer, the distributor or the retailer. The warehouse will distribute such goods to stores, factories, and various other receivers in the territory surrounding the warehouse. In performing its function as a merchandise warehouse, it provides such services as break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, sampling, weighing, provides export and import services, such as U. S. Custom Bonded Storage and numerous other functions related to the storage and distribution of commercial goods.

5. The warehouseman's lien is essential to the business of a merchandise warehouse. The warehouse is generally a small business when compared with the large, national corporations for which it stores merchandise. The 1967 U.S. Department of Commerce, Bureau of the Census, Census of Business, Public Warehousing, BC67-WS9, notes that there were 1,677 general warehouses in the United States. (This is the latest Census of

Business report on warehousing). Of these 1,677 general warehouses, only 27 had 100 or more employees (Table 2). Only 200 of the 1,677 general warehouses earned annual gross revenues of $500,000.00 or more (Table 3). Most of AWA's members are privately-owned companies which are actively managed by the owner who lives in the community where the warehouse is located. Many of the warehouses are located in smaller metropolitan areas. Of the 1,677 in the 1967 study, a total of 954 were located in areas with less than 1,000,000 in population (Table 13). Merchandise warehousing businesses with few exceptions, are locally-owned and locally-based small business companies who store the merchandise of major companies who are located throughout the United States and the world. The lien of the merchandise warehouseman upon the goods stored is essential if he is to deal with such giant companies and their vast resources.

6. The merchandise warehouseman also deals with companies whose credit and reputation is unknown. These companies are located throughout the country and in foreign countries. The local warehouseman could not possibly check the credit standing and reliability of all of these customers. In dealing with manufacturers located at distant points, it must rely upon its lien.

7. Merchandise warehouses are used by manufacturers to permit them to expand into new markets. This is especially true of small, new companies who must gradually introduce their products into new markets. The lien allows the marketing of these products without the pre-payment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies with established distribution systems. The warehousemen's lien protects the warehouseman when these new products or their producers fail. In some of these instances the depositors have completely disappeared and efforts to locate them have failed. In others

they go bankrupt and the warehouseman's lien is a recognized preference which protection is essential in terms of the credit risks of dealing with companies at distant locations.

8. In using the merchandise warehouse as a distribution point, manufacturers maintain a steady flow of goods moving through the warehouse. The warehousemen's lien allows the warehouseman to perform essential services for the goods and to release them prior to payment for such services since the lien is attaching to new goods of the customer that are entering the warehouse. To require the merchandise warehouse to deal with each lot of goods as a separate, distinct unit would either cause an unreasonable risk to be placed upon the warehouseman or it would force it into prepayment procedures that would diminish its value as a distribution center. The existence of the warehousemen's lien facilitates the free flow of goods through the warehouse.

9. Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they prepay freight charges for their customers or accept and pay for collect shipments. The lien protects them when they make such payments and the commercial value of such arrangements is important. In a modern economy, it is essential that goods move freely and quickly. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. Retailers and manufacturers maintain minimum inventories, relying upon a pipeline of goods moving through the warehouse. The warehousemen's lien facilitates the free and easy movement of goods in commerce.

10. If the lien were held unconstitutional for merchandise warehouses, there would be increased costs and unnecessary delay in the movement of the goods. The increased costs would be charged to the bailee and ultimately increase the price of goods.

Affidavit of Donald E. Horton in Opposition to Summary Judgment

11. I have read the preliminary statement contained in the Plaintiffs' Memorandum of Points and Authorities in Support of Motions for Class Action Determination and Summary Judgment and the supporting affidavits of Shirley Herriott Brooks and Gloria Jones. In my entire career in the merchandise warehousing industry, I have never known of a single instance involving a merchandise warehouseman and depositor that even closely resembles the alleged factual circumstances in this case.

Indeed, the climate at the time of deposit of goods in a merchandise warehouse is completely foreign to the climate and circumstances alleged in this case. When goods are deposited in a merchandise warehouse by a manufacturing, distributing, or retailing firm, the deposit is invariably the result of prearrangement, negotiation of terms and charges, and a contractual understanding between depositor and warehouseman. In the event of a continuing business relationship, any changes in terms or charges are similarly the result of negotiation and contractual understanding.

s/ Donald E. Horton
DONALD E. HORTON

Sworn to October 3, 1974

AFFIDAVIT OF ARNOLD H. SHAW IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Affidavit of Arnold H. Shaw in Opposition to Summary Judgment

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am counsel to the Warehousemen's Association of the Port of New York, Inc., and the Cold Storage Warehousemen's Association of the Port of New York, Inc., defendant-intervenors, and I am a member of the bar of the within Court.

I submit this affidavit on behalf of the above mentioned defendant-intervenors in opposition to plaintiffs' motion for summary judgment.

I have been associated with the commercial public warehouse industry since March of 1946, not only as counsel to the Warehousemen's Association of the Port of New York, Inc., but as counsel to many individual commercial warehouse proprietors. My involvement with the industry has not only been of long duration, but it has been of an in-depth nature. I am, therefore, personally knowledgeable as to the facts hereinafter stated.

PRELIMINARY STATEMENT

The principal relief sought by plaintiffs is a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. The predicate for the relief sought by plaintiffs is that under the unique circumstances spelled out in the pleadings and in plaintiffs' supportive affidavits, their constitutional rights were violated by the assertion on the part of the defendant, Flagg Brothers, Inc. of its rights under the U.C.C. warehouseman's lien sections, *supra.* However, plaintiffs are not content with an adjudication of their rights; they go considerably further and demand that the Court declare these U.C.C. lien sections unconstitutional.

In view of the broad and sweeping nature of the relief demanded by plaintiffs herein, this Court granted leave to the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York, as well as to the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. to intervene as defendants. The Court also granted leave to the Attorney General of the State of New York to intervene as a defendant upon the ground that the constitutionality of a State legislative enactment was under attack.

The Warehousemen's Association of the Port of New York, Inc. is a not-for-profit corporation of the State of New York. Its membership consists of a large number of commercial public warehousemen doing business in the City of New York and in the metropolitan New Jersey area. These members are in the business of storing, handling and distributing merchandise, commodities and materials of every conceivable character and description. Their establishments are frequently referred to as "dry" warehouses as distinguished from "cold storage" warehouses.

The Cold Storage Warehousemen's Association of the Port of New York, Inc. is an unincorporated association whose members do business in the same territory, but their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their preservation and storage. Their establishments are frequently referred to as "cold storage" warehouses.

Both of the aforesaid defendant-intervenors store, handle and distribute goods, wares, merchandise, materials and commodities almost exclusively for and on behalf of merchants and other commercial and business establishments engaged in inter-state and international commerce. Their members are,

accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the said defendant-intervenors, are importers who store their goods in United States customs bonded facilities maintained by many of them in accordance with the Customs Revenue Laws and Regulations of the United States. These customs bonded warehouses are an indispensable facility for the great importing industry that is so vital to the commerce of the Port of New York. Importers, save for duty-free commodities, such as coffee, as a rule, place their dutiable property in customs bonded warehouses and thereby avoid the financial hardship of immediately liquidating duties on entry. The importers, in this way, may postpone the payment of duties until they are ready either to introduce their imported products into the domestic territory, or re-export them — in which latter event the payment of duties is avoided altogether. Imports are normally and almost routinely placed in various warehouses belonging to the network of customs bonded warehouses (both dry and cold) usually by customs brokers, and the bonded warehouses, also as a matter of normal routine, accept these imported goods for storage in reliance upon the protection of their warehouseman's lien without which, this flow of international commerce would be so substantially impeded as to effectively put many small or medium-sized importers out of business. It is, therefore, in my judgment scarcely an exaggeration to say that the import industry in the Port of New York might well be destroyed if the warehouseman's lien were to be judicially nullified.

The said defendant-intervenors function on a regional or local level in much the same way as the defendant-intervenors American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc. function on a national level.

For convenient identification, the type of public warehouses represented by the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York, Inc., and their national counterparts, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. will hereinafter be referred to as "commercial warehouses". The principal defendant herein, Flagg Brothers, Inc., although, presumably, a public warehouse, is upon information and belief, not a commercial warehouse. Flagg is in the business of conducting what is commonly referred to as a moving and storage business, the thrust of which is to transport and place in dead storage non-commercial articles of personal property consisting mainly of used furniture and household furnishings belonging to the consuming or general public. For purposes of convenient identification, the type of establishments typified by the defendant, Flagg, will hereinafter be referred to as "furniture warehouses".

I

THERE IS A SUBSTANTIAL DISTINCTION BETWEEN COMMERCIAL WAREHOUSES AND FURNITURE WAREHOUSES.

The distinction between commercial warehouses and furniture warehouses relate not merely to the nature and type of property that may be stored and handled, but to the modus operandi of each.

As previously mentioned, commercial warehouses store and handle every conceivable type of merchandise and commodities, both raw materials and manufactured articles. Moreover, commercial warehouses deal not with the general or consuming public, but with the world of business, i.e., manufacturers,

distributors, retailers, importers, exporters, commodity exchanges and banking or financial institutions. With regard to the last mentioned category, storage of commercial goods in commercial warehouses is a common and frequent instrumentality for business finance in that warehouse receipts are used by the bailors as collateral security for business loans. Furniture warehouses, on the other hand, deal primarily with the general or the consuming public rather than with business and industry.

In the commercial warehouse sphere, storage per se is only one facet of the business. Distribution, filling orders (e.g., handling mail order activities), maintaining inventories, inventory controls, and even processing, are part and parcel of the commercial warehouse industry. In the furniture warehouse, typically, the furniture or other household furnishings are placed in what is known as dead storage for safekeeping with little handling activity involved save for the deposit of the goods initially and the withdrawal of the goods upon the expiration of the term of storage.

The most significant distinction, however, between storage in commercial warehouses and the type of furniture warehouse storage involved in the case at Bar, lies in the manner in which the relationship comes into being in each situation. In the case at Bar, there is a sharp issue on this very question. The defendant, Flagg, contends that the storage of plaintiffs' goods came about with the knowledge and consent of the plaintiffs. The claim, however, of the plaintiffs is that the storage of the goods and the rates charged therefor were unilaterally imposed upon plaintiffs and, therefore, it could not be said that a bailment contract was voluntarily entered into between these parties. This type of a relationship is unheard of in the commercial warehouse industry. The invariable practice and procedure is for the owner of the goods or the authorized agent of the owner of the goods to

deposit the same in the warehouse and otherwise to enter into the contractual relationship of bailment, so that what emerges is a true bilateral contract of bailment.

That there is a substantial distinction between the two types of warehousing is manifest in one of the very sections here under attack, namely, Section 7-210 of the U.C.C. which deals with the enforcement of the warehouseman's lien. This section has two main sub-divisions, sub-division (1) which provides for a public or private sale; and sub-division (2) which provides for a public sale. Sub-division (2) states that: "A warehouseman's lien on goods *other than goods stored by a merchant in the course of his business* may be enforced only as follows: * * *". (underscoring added).

II

IN VIEW OF THE SUBSTANTIAL DIFFERENCES BETWEEN COMMERCIAL WAREHOUSING AND FURNITURE WAREHOUSING, IT WOULD BE INAPPROPRIATE FOR THE COURT TO DECLARE THAT SECTIONS 209 and 210 OF THE U.C.C. ARE UNCONSTITUTIONAL BASED UPON THE FACTS INVOLVED IN THE RELATIONSHIPS BETWEEN THE PLAINTIFFS AND THE DEFENDANT, FLAGG.

At the very most, if the Court should be persuaded that plaintiffs' rights have been impaired, the Court might be justified in holding not that Sections 7-209 and 7-210, U.C.C. are unconstitutional, but that plaintiffs were denied their due process. However, plaintiffs are not, or at least do not seem to be satisfied with such an adjudication, or, for that matter, with any adjudication that would afford them a complete and adequate remedy. They insist upon creating a cause celebre by having the Court go the whole way and declare the statute

unconstitutional on its face in utter disregard of the farreaching, dire consequences mentioned below.

It goes without saying that the constitutional issues herein presented should not be weighed in a vacuum. The practical consequences of acceding to the extravagant demands of the plaintiffs are relevant for if Section 7-209 and 7-210 of the U.C.C. are declared unconstitutional as demanded by plaintiffs, the consequences not only to the commercial public warehouses, but to the whole of national and international trade and commerce would be devastating. The Court, is, therefore, respectfully cautioned to take heed of these possible consequences. It is reasonable to anticipate that the free flow of goods in commerce would be impeded. From time immemorial, public warehousemen's dependence upon the security of the warehouseman's lien has been the sine qua non of their operations. They readily take into their establishments for storage goods of every description from all types of bailors. Without the lien, commercial warehousemen would, of necessity, be required to be selective and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. It is, therefore, not difficult to envision the magnitude of the curtailment and destruction of trade, commerce and industry if the lien were nullified, bearing in mind the extent to which commercial activities depend upon the facilities of commercial warehousemen.

The drastic and extravagant remedy of a declaration of constitutional invalidity is neither necessary nor even essential to the protection of plaintiffs' rights, and great care should be taken by the Court to limit the application of any judicial declaration to the facts and circumstances of the case at Bar and not to Sections 7-209 and 7-210, of the U.C.C., on their face.

III

PLAINTIFF HAS FAILED TO STATE A FEDERAL CAUSE OF ACTION AND THIS COURT IS, ACCORDINGLY, WITHOUT JURISDICTION.

The statutory warrant for this action is 42 U.S.C. Section 1983. However, in order than an action under this Section may be sustained, a showing that action by the State of New York is involved is mandatory. Plaintiffs have failed in such a showing.

Plaintiffs' argument that the imposition and execution of the warehouseman's lien constitutes State action so as to give this Court jurisdiction is inconsistent with the recognition throughout plaintiffs' brief that the warehouseman's lien, as such, existed under common law. Under these circumstances, the claim that Section 7-209 of the U.C.C. which in essence declares that the warehouseman has a lien is really not under attack. Actually, the only section that the plaintiffs are attacking is Section 7-210 which deals with the enforcement of the warehouseman's lien and which, according to the plaintiffs, involves State action. To support this argument, plaintiffs have urged that in enforcing their lien, warehousemen perform functions that are ordinarily performed by public officials, such as a sheriff. It is quite clear that the warehouseman's lien type situation is a great deal closer to those which the various decisions cited have found that State action is not involved because there is no delegation of the traditional State power granted to any person or to any official. It is almost absurd to predicate a claim that State action is involved on the ground that a largely substantive State statute is also involved. Further, not only the lien, but the method of enforcement of the lien are not dependent upon statute. It has previously been pointed out that plaintiffs concede that the lien existed under common law.

In addition, the right to enforce the lien is not wholly dependent upon the statute, but may be predicated upon a contract between the bailor and the bailee. There is nothing governmental or public about the lien or its enforcement. It is essentially a private transaction and a private activity in which the State plays no role whatsoever procedurally. The only involvement of the State is in its purely legislative function in having enacted a statute that prescribes a substantive right and a means of enforcing that right which *could* be created by contract even in the absence of the statute. There are no State regulations; there are no administrative agencies involved; there are no public officials who are clothed with authority to take action. As already stated, what we have here is a strictly private-type transaction that existed under common law and that can be created by contract. Under these circumstances, State action is not involved and an essential element of this Court's jurisdiction is, therefore, lacking.

IV

THERE ARE TRIABLE ISSUES OF FACT PRESENTED WHICH SHOULD BE SUBMITTED FOR DETERMINATION IN A STATE FORUM. SUMMARY JUDGMENT IN A FEDERAL COURT IS SINGULARLY INAPPROPRIATE.

Plaintiffs claim that they were involuntarily hoodwinked into going along with the warehousing of their property. Defendant, Flagg, claims that the warehousing relationship came into being with the knowledge and consent of the plaintiffs and the result was a bilateral bailment contract. This is the principal issue presented, the resolution of which involves a determination of credibility and all of the other factors that can be deduced only from the kind of evidence presented at a trial in a State court, and not from the summary statements imparted

Affidavit of Arnold H. Shaw in Opposition to Summary Judgment

by affidavit and memoranda in a motion for summary judgment in a Federal Court.

To repeat, the rights and corresponding obligations as between these principal parties can, and indeed should be determined by individual suits in State courts of appropriate jurisdiction. All appropriate remedies are readily available thereby.

V

CLASS ACTION STATUS IS NOT INDICATED.

Class action status is neither warranted nor justified. The substantial differences between commercial warehouses and furniture warehouses, as above delineated, and the unique circumstances surrounding the transactions between plaintiffs and the defendant, Flagg, strongly militate against class action treatment. Class action status, *if any*, should be confined to the type of establishment represented by the defendant, Flagg, as well as the aforesaid unique circumstances, *i.e.*, removal of furniture and household furnishings by a City marshal or similar officer pursuant to a judgment of a State court, and the placing of such goods in a public warehouse. Similar circumstances, to the best of my knowledge, never arise in the commercial warehousing industry.

It is respectfully submitted that the within motion be denied, and that the complaints herein be dismissed.

s/ Arnold H. Shaw
ARNOLD H. SHAW

(Sworn to October 16, 1974)

DISTRICT COURT OPINION AND ORDER #42742 DISMISSING COMPLAINT, 404 F.SUPP. 1059 (S.D.N.Y. 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants.

73 Civ. 4050 (HFW)

HENRY F. WERKER, D.J.

Plaintiffs Brooks and Jones are residents of Westchester County whose property was stored by defendant Flagg Brothers, Inc. following their evictions by the Mount Vernon Marshal in 1973.[1] On their own behalf and that of a proposed class of "persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code § 209 and subject to sale pursuant to New York Uniform Commercial Code § 210 because of warehouse fees allegedly due,"[2] they

challenge the constitutionality of those two statutes pursuant to 42 U.S.C. § 1983.[3] They allege deprivation of due process guaranteed by the Fourteenth Amendment of the United States Constitution, and seek declaratory and injunctive relief as well as money damages. Their proposed class of defendants includes "all . . . warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."[4]

Section 7-209 grants a warehousemen a lien on goods stored, and/or transported, for fees allegedly owed by the customer.[5] Section 7-210 gives a warehouseman the authority to enforce such a lien by public or private sale upon proper notification to the customer and adherence to commercially reasonable sale procedures.[6]

Plaintiffs have moved for class action certification of both a plaintiff and a defendant class, and for summary judgment on the question of the statutes' constitutionality. Defendants have cross-moved to dismiss for failure to state a cause of action and for lack of subject matter jurisdiction on the ground that the challenged conduct does not constitute state action within the meaning of the Fourteenth Amendment, and was not performed "under color of" state law within the meaning of § 1983.[7] Upon careful consideration of the facts in this case and the following analysis of relevant Second Circuit and Supreme Court decisions, the court finds that defendants are indeed correct. Plaintiffs' action is consequently dismissed for lack of jurisdiction.

Plaintiffs have advanced four arguments in support of their assertion that state action is present in the challenged activity. Their first argument is that the Second Circuit's decision in *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973) compels a finding of state action in this case. State

action, however, was never discussed in that opinion. In *Hernandez* plaintiff challenged the garageman's lien provisions of the New York Lien Law which allow a garageman to detain an automobile until alleged storage and repair charges are paid, and to foreclose his lien by selling the auto upon proper notification to the bailor.[8] The district court judge dismissed the complaint, noting:

> "[E]ven assuming that the defendants are acting under color of state law, the court cannot find that the plaintiffs' constitutional right to due process of law has been deprived by the operation of the challenged provisions of the lien law. Consequently, . . . the court need not go further and formally pass upon the second requirement — the presence of state action."

346 F. Supp. 313, 317 (E.D.N.Y. 1972).[9] On appeal the Second Circuit upheld the dismissal as to the detention provisions of the New York Lien Law because it found that having voluntarily delivered his car to the defendant garageman, and having never requested its return or tendered reasonable storage charges, the plaintiff had no standing to challenge the lien. 487 F.2d at 380. As to the sale provisions of the statute, however, the court noted that if, upon remand, the district judge were to find plaintiff's version of the facts as alleged,

> "then we would conclude that plaintiff has, under the doctrines enunciated in *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, a tenable contention that Section 204 of the New York Lien Law as applied here was repugnant to the due process clause of the Fourteenth Amendment. . . ."

Id. at 380-81. Neither the court's opinion nor the concurring opinion[10] in *Hernandez* mentioned or discussed the issue of state action.

Plaintiffs argue that a "finding" of state action is implicit in both *Hernandez* opinions. However, because District Judge Costantino had merely assumed the presence of state action in order to consider and dismiss the Hernandez constitutional claim on its merits, the state action issue was not properly before the Court of Appeals; the sole issue on appeal was whether, assuming state action, plaintiff had stated a claim. Furthermore, even if a finding of state action were implicit in the Second Circuit's decision, this court would not be bound by such a *sub silentio* ruling. *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 38 (1952). This court therefore concludes that the Second Circuit's decision in *Hernandez* is not dispositive of the state action issue in this case.

Plaintiffs, in their remaining argument, would have the court find state action because:

> - the warehouseman who enforces his own lien pursuant to § 7-210 is performing what has traditionally been a public function;
>
> - the state imposes extensive regulation on the warehousing industry, including regulation of the challenged activity; and
>
> - section 7-210 confers on warehousemen rights in excess of those at common law.

The question of whether state action exists usually arises with respect to private conduct upon an allegation that the conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become suject

to the . . . limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). However, as the Supreme Court noted in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972), "while the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." The answers, particularly in recent months, have varied from circuit to circuit, and even within the Second Circuit have produced division and disagreement among panels.[11]

In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975), Judge Smith enumerated five factors culled from a review of state action case law which the court found to be "particularly important to a determination of state action":[12]

> (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme;(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition a' a 'private' organization in associational or other constitutional terms.
>
> Each of these factors is material; *no one factor is conclusive.*

* * *

> Moreover, even if one of these factors is absent, a finding of state action may still be appropriate.

Id. at 629-34 (emphasis added). Plaintiffs' second argument for state action, that in enforcing his own lien a warehouseman is performing a public function, finds support in Judge Smith's list above. Their rationale is that at common law a warehouseman could enforce his lien only by obtaining a court judgment and having the sheriff execute on it; thus, by allowing a warehouseman to enforce his lien without resort to the courts and the sheriff, § 7-210 enables him to perform an "inherently" public function. Plaintiffs rely for this theory upon *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20 (1973) in which the New York Court of Appeals found that an innkeeper's execution of his own lien amounts to the exercise of a public function: "[T]he execution of a lien, be it conventional security interest, (cite), a writ of attachment (cite), or a judgment lien (cite), traditionally has been the function of the Sheriff."

The liens referred to by the Blye court, however, all involve satisfaction of a debt having no particular relation to the goods executed upon. While such liens historically belong to the sheriff for execution, execution on goods lawfully in a warehouseman's possession, to satisfy charges *arising out of such possession,* is not traditionally a function of the sheriff; traditionally the sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien.[13] *Melara v. Kennedy,* 74 Civ. 1535, N.D. Cal., August 21, 1974. *Accord,* Collier, Procedural Due Process — Post Fuentes Constitutionality of Garageman's Liens, 54 B.U.L. Rev. 542, 554 (1974). This distinction mandates rejection of the public function theory.[14] *Cf. James v. Pinnex,* 495 F.2d 206, 208 (5th Cir. 1974); *Melara v. Kennedy, supra.* In *Melara,* a case substantially identical to the one at hand, the court held that enforcement of a lien pursuant to § 7210 of the California Uniform Commercial Code was not performance of a state or public function, and did

not constitute state action. *See also Parks v. Ford,* 72 Civ. 639, 73 Civ. 1699, E.D. Pa., December 11, 1974. (Pennsylvania's repairman's lien statutes do not so infuse private acts of detention and sale with state involvement as to render them state action).

Plaintiffs' third argument in support of state action relies upon the public function theory and must be rejected with it. They suggest that because "warehouses and warehousemen are affected with a public interest," state regulation of the industry permeates its nominally private acts with state action. This line of reasoning was effectively foreclosed by the Supreme Court in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). In that case petitioner challenged the constitutionality of the defendant's authority, under a tariff filed with the State Public Utilities Commission, to cut off her electric power without meeting the due process standards enumerated in *Fuentes v. Shevin,* 407 U.S. 67 (1972). Justice Rehnquist, writing for the Court, stated:

> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actions in all their actions.
>
> We decline the invitation for reasons stated long ago in *Nebbia v. New York,* 291 U.S. 502 (1934), . . . :
>
> > It is clear that there is no closed case or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature

> of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . In several of the decisions of this Court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been put forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.' *Id.*, at 536.

Id. at 353.

Plaintiffs seem to have anticipated such foreclosure, for they suggest in the alternative that even if the challenged activity is essentially private, state regulation of the industry is so directly and significantly involved therein that the state must be viewed as a joint participant. Under this rubric which tracks factor (2) in Judge Smith's list above, the state's "involvement" is its regulation of the warehouseman's lien sale and its failure to include in that pervasive regulation a requirement of *Fuentes* due process standards. This in essence is the theory first used by the Supreme Court in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).[15] *Burton,* however, is distinguishable in two important ways. First, in the instant case the symbiotic relationship between the state and the private defendant present in *Burton* is missing. Secondly, *Burton* was a case involving racial discrimination, and "racial discrimination is so peculiarly offensive and . . . so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." *Coleman v. Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970).[16] *See also Greco v. Orange Memorial Hospital Corp.,* 43 U.S.L.W. 2522-23 (5th Cir. 1975); *Adams v. So. Cal. First National Bank,* 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied,* 43 U.S.L.W. 3277 (1974). Thus resolution of the state action

issue in this, a non-racial case, is not controlled by the standards evolved in cases of racial discrimination.

Plaintiff's last argument, and by all appearances the sturdiest, is that by statutorily conferring on warehousemen a power not possessed at common law, the state has created an impetus for warehouseman lien sales, has encouraged such sales, and has thereby so involved itself in the challenged conduct as to transform it into state action.[17] (See factor (3) of Judge Smith's *Jackson v. Statler Foundation* list, *supra.*) The key to this argument is the alteration of common law, for the Second Circuit in recent decisions has held mere statutory codification of common law rights insufficient state involvement to constitute state action. *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974); *Shirley v. State National Bank,* 493 F.2d 739 (2d Cir. 1974). In *Shirley,* where plaintiff challenged repossession of goods purchased under an installment sales contract, the court stated:

> . . . since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action.

Id. at 743. Likewise, in *Bond,* the court found that state action was not present in an assignment of wages made pursuant to New York's wage assignment statute because "the statute has not given the assignee anything new." *Id.* at 311. *See also Phillips v. Money,* 503 F.2d 990 (7th Cir. 1974); *Fletcher v. Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir. 1974); *Parks v. Ford, supra* at 30-31; *Boland v. Essex County Bank and Trust Co.,*[18] 361 F. Supp. 917 (D. Mass. 1973).

The question remains whether satisfaction of this "common law codification or alteration" test alone constitutes state involvement significant enough to be called state action. Judge Smith in *Jackson v. Statler Foundation, supra,* warned that "no

one factor is conclusive." By definition, if the facts here do not meet the state action standards for cases of racial discrimination such as *Statler Foundation*, they do not meet the more exigent prerequisites to state action in non-racial cases. The Fifth and Ninth circuits, in the context of challenges to self-help repossession statutes, have both found the common law test, alone, to be insufficient. In *Adams v. So. Cal. First National Bank*, *supra*, the Ninth Circuit stated:

> [W]e do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.*, that a secured party upon default had a right to take possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983.

492 F.2d at 330. The Fifth Circuit in *James Pinnex*, *supra*, noted:

> . . . the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it except when the contract is silent on the point. Thus the creditor's arguments that § 9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.

495 F.2d at 498. The court then went on to conclude, however, "No bright lines can be drawn in this area, and we draw none. Some state involvement . . . may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action."

Given the Second Circuit's discussions in *Shirley* and *Bond*, as well as relevant decisions from other courts, it seems clear to this court that with respect to those members of plaintiffs' "class" whose contracts contained a sale-in-case-of-default provision, there is no state action. See note 17 *supra*. As the Ninth Circuit noted in *Adams*, "the State cannot be held responsible for creating conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property." 492 F.2d at 333. See Note — State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656 at 665 (1974). Indeed, one case which has dealt specifically with § 7-210 and a contractual provision for sale has so ruled. *Smith v. Bekins Moving and Storage Co.*, 384 F. Supp. 1261 (E.D. Pa. 1974). Furthermore, here as in *Shirley* and *Bond*, the codification and alteration of common law also impose certain procedural restraints on it, to the benefit of warehouse customers, *i.e.*, requirements as to fair notice, reasonable sale, etc., and thus, as in those cases, represent ameliatory rather than regressive action. "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." *Jackson v. Statler Foundation*, *supra* at 639.

Likewise, with respect to those in plaintiffs' "class" who are subject to no contractual provision of sale, the court also fails to find sufficient state involvement to constitute state action. It is true that for this group of warehouse customers the defendants' power of sale comes only from § 7-210. However, in its decision in *Jackson v. Metropolitan Edison Co.*, *supra*, the Supreme

Court stated: "Approval by a state utility commission . . . , where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" *Id.* at 357 (emphasis added). In this case no less than in Jackson, the state's involvement in the challenged activity is merely permissive. For this reason, and for the reasons detailed above, the court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28 U.S.C. § 1343(3), or to state a claim under 42 U.S.C. § 1983. The action is therefore dismissed.

SO ORDERED.

Dated: New York, New York

July 7, 1975

_____

U. S. D. J.

NOTES

1. For the allegations of these named plaintiffs see the decision on Jones' motion to intervene by the Honorable Murray Gurfein, then U.S.D.J., at 63 F.R.D. 409, 411-12 (S.D.N.Y. 1974).

2. Verified Complaint at 2.

3. Section 1983 reads:

   > Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

   Federal district courts have jurisdiction to hear actions under § 1983 by virtue of 28 U.S.C. § 1343 (3).

4. Verified Complaint at 3.

5. Prior to codification by the U.C.C. and its predecessors, such a lien existed at common law. R. Brown, The Law of Personal Property § 119 (2d ed. 1955).

6. Such a right of enforcement did not exist in New York at common law, although it has existed in statutory form since 1879. See note 17, *infra.*

7. The "state action" and "action under color of state law" concepts have been found to be functionally equivalent. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970). Hereinafter they shall be jointly referred to as "state action."

8. The statutes challenged in *Hernandez* are substantially similar to those in question here. *Compare,* New York Lien Law §§ 184, 201, 202 and 204 with New York U.C.C. §§ 7-209, and 210.

9. In a footnote, however, Judge Costantino noted that the presence of state action "would seem to be quite manifest." "Though he is a private individual, the lienor through the public auctioneer it has retained, is performing a traditionally public function pursuant to a right accorded it by a state statute." 346 F. Supp. 313 at 317.

10. Judges Timbers and Lumbard, in a concurring opinion, went further than Judge Wyzanski in the court's opinion, stating that they would direct the district court to declare the sale provisions unconstitutional as applied if plaintiff were to prove his allegations.

11. In *Tucker v. Maher,* 497 F. 2d 1309 (2d Cir. 1974) Judge Mulligan noted:

> Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.

In a footnote he then added:

> In *Shirley v. State Nat'l Bank,* 493 F.2d 739 (2d Cir. 1974), and *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974), after both panels had split 2-1 over state action issues, rehearings en banc were denied . . . by votes of 5-3. In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), again a state action case, a rehearing en banc was also denied by a failure of a majority of the active judges to vote in favor of such reconsideration; the vote was 4-4, 496 F.2d at 636.

Id. at 1315.

12. Although the *Jackson v. Statler Foundation* factors were enumerated in the context of an action against charitable foundations for alleged racial discrimination, and the courts have traditionally used a lesser state action standard where race is concerned (see page 9, *infra*), they are helpful in delimiting the outer boundaries of state action prerequisites. The court in *Statler Foundation* found that if the defendant institutions were substantially dependent upon their tax-exempt status, if the government's regulatory scheme was both detailed and intrusive, if the scheme carried connotations of government approval, if the institutions did not have a substantial constitutional claim to be left alone, and if they served some public function *then* the district court on remand could find state action.

13. Ever since its statutory creation in 1879 (L. 1879 c. 336), the warehouseman's lien has traditionally been enforced by warehousemen themselves.

14. Even if this court were to conclude, however, that enforcement of a lien pursuant to § 7-210 constitutes execution of a public function, this conclusion would not lead inexorably to a finding of state action. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974); *Powe v. Miles,* 407 F.2d 73, 80 (2d Cir. 1968).

15. In *Jackson v. Metropolitan Edison Co., supra,* the Supreme Court described the Burton case as follows:

> . . . where a private lessee who practiced racial discrimination leased space for a restaurant from a state parking authority in a publicly owned building the Court held that the State had so far insinuated

itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.* at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. 419 U.S. at 357-58.

16. Our circuit has long recognized a double 'state action' standard, a less onerous test for cases involving racial discrimination, and a more riguous standard for other claims. *See United States v. Wiseman,* 445 F.2d 792, 795 at n.3 (2d Cir. 1971).

17. The statutory right to enforce the warehouseman's lien, first enacted in 1879, was reenacted as § 118 of the New York General Business Law in 1907. L. 1907, c. 732 § 33, as amended L. 1949, c. 588. In 1962 the state legislature again reenacted it, this time as part of the U.C.C., effective since 1964. The state courts have traditionally considered these statutory provisions to be in derogation of common law. *See, e.g.: Maritime World Corp. v. Grefe Steel Warehouse Corp.,* 154 N.Y.S. 2d 684 (S. Ct. N.Y. Cnty 1956); *Hackett v. Nelson Express & Storage Co.,* 294 N.Y.S. 905 (S. Ct. N.Y. Cnty 1937). To the extent, however, that contractual provisions between warehousemen and customers allowing for sale in case of default have been enforced by the courts, sale provisions of contractual origin can be said to be part of the state's common law. *Cf.* note 18, *infra.* A majority of warehouseman contracts in New York apparently contain such provisions.

18. In *Boland,* the court examined the constitutional validity of the Massachusetts self-help repossession statute. It found that at common law repossession was allowed *only if* *provided* for by contract, whereas the statute in question allowed repossession *unless* it was *prohibited* by contract. In dicta the court asserted that the same differences had existed in *Shirley v. State National Bank, supra,* between the common and statutory law of Connecticut, adding: ". . . there is no indication in the [Second Circuit] court's ruling in *Shirley v. State National Bank* that the parties undertook to demonstrate to the court the changes in the law of Connecticut brought about by its enactment of the U.C.C." *Id.* at 921. The *Boland* court found that state action existed.

19. The court notes that a challenge to §§ 7-209 and 7-210 has already been mounted in the state courts. In *Jones v. Banner Moving and Storage Inc.,* 358 N.Y.S.2d 885 (Kings Cnty 1974), the New York Supreme Court found those statutes to be unconstitutional for essentially the same reasons plaintiffs would present here. That decision has been argued on appeal to the Appellate Division, 2d Dept., and is now *sub judice.*

MEMORANDUM ENDORSED ON PLAINTIFFS' AFFIDAVITS AND NOTICE OF MOTION FOR CLASS ACTION DETERMINATION AND FOR SUMMARY JUDGMENT

Motion denied.
Complaint dismissed.
See opinion #42742.

So ordered.

s/ Henry F. Werker
U.S.D.J.

MEMORANDUM ENDORSED ON DEFENDANT FLAGG BROTHERS, INC.'S AND HENRY FLAGG'S AFFIDAVITS AND NOTICE OF MOTION TO DISMISS COMPLAINT

Motion granted.
See opinion #42742.

So ordered.

s/ Henry F. Werker
U.S.D.J.

NOTICE OF APPEAL TO SECOND CIRCUIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

NOTICE is hereby given that SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment and order of the United States District Court denying plaintiffs' motions for a class action determination and summary judgment, and granting defendants' motion to dismiss, and from the judgment and order dismissing the above entitled action, and from each and every part of said judgment and orders, entered in this action on the 7th day of July, 1975.

Dated: July 24, 1975
White Plains, New York

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

(Service list omitted)

COURT OF APPEALS OPINION REVERSING DISMISSAL AND REMANDING CAUSE, 553 F.2d 764 (SECOND CIRCUIT, APRIL 7, 1977)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—September Term, 1975.

(Argued February 13, 1976 Decided April 7, 1977.)

Docket No. 75-7437

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

Before:

TIMBERS, *Circuit Judge,* and
HOLDEN* and BRYAN,** *District Judges.*

* James S. Holden, Chief Judge of the District of Vermont, sitting by designation.

** Frederick vP. Bryan, Senior District Judge of the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, dismissing, for lack of state action, plaintiff's complaint challenging §§7-209 and 7-210 of the New York Uniform Commercial Code as violative of 42 U.S.C. §1983 and the due process clause of the fourteenth amendment to the United States Constitution.

Reversed and remanded.

Martin A. Schwartz, Esq., White Plains, N.Y. (The Legal Aid Society of Westchester County, White Plains, N.Y., on the brief, Lawrence S. Kahn, Evelyn Isaac, of counsel), *for Plaintiffs-Appellants.*

Alvin Altman, Esq., New York, N.Y. (Brodsky, Linnett & Altman, New York, N.Y., on the brief, Michael Barnas, of counsel), *for Defendants-Appellees Flagg Brothers, Inc., and Henry Flagg.*

William H. Towle, Esq., Chicago, Ill. (Burke, Kerwin & Towle, Chicago, Ill. and Werner & Weiss, P.C., New York, N.Y., on the brief, Norman Weiss, of counsel), *for Defendants-Appellees American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.*

Arnold H. Shaw, Esq., New York, N.Y. (Jaffe, Shaw & Rosenberg, New York, N.Y., on the brief), *for Defendants-Appellees Warehousemen's Association of New York and New Jersey, Inc., and the Cold Storage*

Warehousemen's Association of the Port of New York.

A. Seth Greenwald, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, State of New York, and Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for Defendant-Appellee Louis J. Lefkowitz, Attorney General of the State of New York.*

Bryan, *Senior District Judge:*

New York Uniform Commercial Code §7-209 grants a warehouseman a lien upon goods in his possession for charges incurred in connection with storage, and permits him to retain the goods until such charges are satisfied. New York Uniform Commercial Code §7-210 gives the warehouseman the power to enforce his lien by selling the stored goods, after complying with specified procedures.[1]

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1 The full text of the statutes in question follows:

§ 7—209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no

This statute provides that notice of a prospective sale be given to the owner of the stored goods. It does not, however, contemplate any judicial determination of the amount owing prior to the sale of the goods in satisfaction of the warehouseman's charges.

The question presented by this appeal is whether the warehouseman's enforcement of his lien in this manner constitutes action "under color of" state law within the meaning of 42 U.S.C. §1983 or state action under the

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charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

§ 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against

fourteenth amendment.[2] We hold that it does, and therefore reverse the lower court's dismissal of the complaint and remand for a determination of whether the statutory scheme involved comports with due process.

I.

Since the case comes before us on the dismissal of the complaint, we accept the plaintiffs' allegations of fact as true. *See Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

The original plaintiff in this case, Shirley Herriott Brooks, was a resident of Mount Vernon. On June 13, 1973, pursuant to an order of eviction of the City Court of Mount Vernon, the city marshal removed Brooks and her possessions from her apartment. Brooks told the marshal that she wanted to call someone to store her furniture and other household goods. The marshal informed her that she could not do so and that the man with him, defendant Henry Flagg, president of defendant Flagg

whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

2 The "under color of" state law provision in §1983 is equivalent to the state action requirement of the fourteenth amendment. *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739, 741 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), citing *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 n.7 (1970) and *United States* v. *Price,* 383 U.S. 787, 794-95 n.7 (1966).

Brothers, Inc., would store her furniture. Flagg told Brooks that she would have to pay $65 per month for the moving and storage of her furniture. Brooks replied that this sounded like a high price but, believing that she had no choice, authorized Flagg to proceed with the moving and storage of her furniture and household possessions.

As soon as her goods were loaded on Flagg's trucks, one of the moving men told Brooks that she would have to pay $178—$75 per month for storage, $75 for barreling and platforming, and $28 for fumigating. Brooks protested that the entire job was only to cost $65, but eventually handed over a check for $178.

On or about June 15, 1973, Brooks called Flagg Brothers to find out how long it would store her goods for the $178 payment. She was informed that she already owed an additional $156. On June 19, 1973, Brooks went to the Flagg Brothers office. She was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Flagg Brothers regarded the $178 payment as a deposit and that there was a "balance due" of $156.[3] Brooks told Henry Flagg that the charges were unreasonable and that she could not pay them. He told her that on the first of July, 1973 she would owe an additional $75 for storage for the month of July. Brooks argued that her storage

3 We reject Flagg Brothers' assertion that Brooks agreed to sale upon default in payment by accepting, some six days after the initial storage, the "Combined Uniform Household Goods Bill of Lading and Freight Bill" which in minute print referred to sale by the warehouseman in the event of nonpayment of storage charges. *See Fuentes* v. *Shevin,* 407 U.S. 67, 94-96 (1972). We thus view the authorization of sale of stored goods by Flagg as arising solely from §7-210, specifically subsection (2) which governs enforcement of a warehouseman's lien on goods other than goods stored by a merchant in the course of his business, and not from any contractual provisions. This is undoubtedly the case with respect to plaintiff Jones, who alleges that she never authorized storage of her goods, *see infra* at 4. The court below adopted this analysis, at least in part.

payment on June 13, 1973 should run to July 13, 1973, but Flagg insisted that, since storage charges are computed on a "per month" basis, even if her goods had been stored on June 29, 1973 an additional $75 would still be due on July 1, 1973.

The dispute over storage charges continued. On August 25, 1973, Brooks received a letter from Flagg Brothers informing her that unless she paid her outstanding balance of $306 within 10 days, her furniture would go up for sale. This letter was accompanied by a "Final Notice" informing Brooks that, unless payment on her storage account were made, Flagg Brothers would advertise her goods for public auction.

On September 21, 1973, Brooks instituted this action on behalf of herself and a proposed class consisting of

> persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

Relying upon 42 U.S.C. §1983[4] and its jurisdictional counterpart, 28 U.S.C. §1343(3),[5] she sought injunctive and

4 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5 28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

declaratory relief and damages on the ground that the detention and threatened sale of her goods pursuant to New York Uniform Commercial Code §§7-209 and 7-210 violated the due process clause of the fourteenth amendment. Named as defendants were the Mount Vernon marshal,[6] Henry Flagg, and Flagg Brothers, Inc., individually and as representative of a proposed defendant class consisting of

> warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 [sic] without affording the owner of the goods a prior opportunity to be heard.

In accordance with an agreement between counsel, on January 24, 1974, subsequent to the filing of the complaint, Brooks was permitted to remove her possessions from Flagg Brothers' warehouse without paying the disputed storage charges. Then in February, 1974 counsel stipulated that the action, with the classes described substantially as above, was a proper plaintiff and defendant class action under Fed. R. Civ. P. 23 with respect to the claims for injunctive and declaratory relief. These stipulations, however, were never approved by then District Judge Gurfein, to whom the case was assigned.

On June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as party plaintiff pursuant to Fed. R. Civ. P. 24. Jones' allegations were parallel to

> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

6 The action was subsequently dismissed as to the marshal by agreement of the parties.

those of Brooks. She, too, had been evicted by the Mount Vernon marshal, who was accompanied by an employee of Flagg Brothers. Jones denies, however, that she ever authorized Flagg Brothers to store her goods "either by written or oral contract, or otherwise," and claims that she was never advised of the rate she would have to pay for the storage of her household belongings. At the time of her proposed intervention, Jones' goods were still being retained by Flagg Brothers, who informed her counsel that they had no present intention to sell the goods and would inform him well in advance if they did decide to sell them.[7]

By the same order that granted Jones' motion to intervene, Judge Gurfein permitted the Attorney General of the State of New York, the American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc., the Warehousemen's Association of the Port

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7 It appears that after the district court rendered its decision of July 7, 1975 dismissing the complaint, *see infra* at 5, Mrs. Jones informed her counsel that she had paid Flagg $1,600 for the return of her goods; that she did not receive all of her goods back; that some of her goods were received in damaged condition; and that she did not make the $1,600 payment voluntarily but only because of alleged threats of sale and the twenty-month detention of the goods.

Thereafter, by letter dated December 15, 1976, while this appeal was *sub judice*, Jones' counsel informed the court pursuant to Fed. R. App. P. 43 that he had learned of her recent death.

It is well settled that a plaintiff's cause of action under 42 U.S.C. §1983 survives for the benefit of the estate if the applicable state law creates a right of survival. *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961). *See also Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (§1983 claim survives plaintiff's death after suit was brought even though it would abate under applicable state law). Jones' claims for relief would survive under New York Estates, Powers and Trusts Law §§11-3.1, 3.2(b), and thus are not abated by her death for purposes of this suit. Accordingly, counsel for Jones requests that, in the event of reversal, the case be remanded to the district court with leave for substitution of her personal representative pursuant to Fed. R. Civ. P. 25(a).

of New York, Inc.,[8] and the Cold Storage Warehousemen's Association of the Port of New York to intervene as parties defendant. *Brooks* v. *Flagg Brothers, Inc.*, 63 F.R.D. 409 (S.D.N.Y. 1974). The Attorney General was allowed to intervene on consent. Judge Gurfein permitted the trade associations to intervene over the objection of plaintiffs' counsel. The associations claimed that their members were engaged in large scale warehousing on behalf of merchants and other commercial entities functioning in interstate commerce, and argued that their interests in upholding the constitutionality of §§7-209 and 7-210 would not be adequately represented by Flagg Brothers, whose business was the moving and storage of furniture and other household goods.

On August 26, 1974, plaintiffs moved for class certification as to both plaintiffs and defendants, and for summary judgment on the question of the constitutionality of §§7-209 and 7-210. On September 19, 1974, the Flagg defendants moved to dismiss the action for failure to state a claim upon which relief can be granted.

By decision and order dated July 7, 1975, Judge Werker, to whom the case had been reassigned, denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint. Applying the analysis of *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975),[9] Judge Werker concluded

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8 The Warehousemen's Association of the Port of New York, Inc., subsequently amended its certificate of incorporation to change its name to "Warehousemen's Association of New York and New Jersey, Inc."

9 In *Jackson*, Judge Smith specified five factors that are "particularly important" to a determination of state action:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to

that in imposing and enforcing his lien pursuant to §§7-209 and 7-210, the warehouseman does not act "under color of" state law within the meaning of 42 U.S.C. §1983. He dismissed the action for failure to state a claim under 42 U.S.C. §1983 without passing upon the due process claims or the class certification questions. This appeal followed.

Appellants do not presently press their challenges to §7-209, which authorizes imposition of the warehouseman's lien and retention of stored goods until it is satisfied.[10] They do, however, contend that enforcement of the warehouseman's lien by sale pursuant to §7-210 constitutes state action because the statute (1) delegates to the warehouseman uniquely governmental power and (2) expands the remedies available to the warehouseman beyond those which he possessed at common law. On the present record, this question is properly before us for decision. *See Tedeschi* v. *Blackwood,* 410 F. Supp. 34, 38-41 (D. Conn. 1976) (three-judge court) and cases there cited. *See also Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 752-757 (1976).

II.

The state action inquiry is not an easy one. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 172 (1972). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Au-*

which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Each of these factors is material; no one factor is conclusive.

496 F.2d at 629.

10 However, they state that they wish to preserve this point for possible review by the Supreme Court.

thority, 365 U.S. 715, 722 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974).

The first step in the resolution of this question is to identify correctly the particular kind of state action allegation with which the court is dealing. This is because standards for determining state action have been formulated in many different contexts, and the resulting formulations are not often interchangeable. For example, the criteria for finding state action in equal protection cases involving charges of racial discrimination are easier to meet than those formulated in cases such as that at bar. *See, e.g., Coleman* v. *Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, *J.* concurring); *Jackson* v. *Statler Foundation, supra,* at 628-29; *Girard* v. *94th St. and Fifth Ave. Corp.,* 530 F.2d 66, 69 (2d Cir.), *cert. denied,* 425 U.S. 974 (1976). Similarly, tests for determining whether the state has become so entwined with a private entity—by financially supporting it, regulating it, or otherwise—as to make the actions of the private entity the state's own, are not of much help in resolving other types of state action problems.

In this case, Judge Werker used the factors enumerated in *Jackson* v. *Statler Foundation, supra,* at 629, *see supra* n.9, to determine whether state action was present. The *Jackson* factors, however, developed in a case where the appellant sought to characterize the allegedly racially discriminatory activities of certain private foundations as state action by virtue of the foundations' tax exempt status, are not particularly enlightening when applied to the factual situation at hand. The instant case involves a question of alleged delegation of distinctly governmental power,

which can best be resolved by reference to cases involving similar facts.

The Supreme Court has not yet squarely addressed the question of whether a delegation of state authority to creditors constitutes state action. Its only comment on the subject came in *Jackson* v. *Metropolitan Edison Co., supra,* where the Court rejected a claim that state action was present in a tariff-authorized termination of electric service by a privately owned and operated utility corporation holding a certificate of public convenience issued by the Pennsylvania Utility Commission. The Court there noted:

> If we were dealing with the exercise by [the power company] of some power delegated to it by the State which is traditionally associated with sovereignty . . . our case would be quite a different one.

419 U.S. at 352-53.

Several circuit courts, however, have decided the state action question in cases involving due process challenges to summary creditors' remedies similar to that presented here. These cases have focused on essentially the same factors (whether the state has delegated one of its unique powers to a private person; whether the common law rights of the creditor were expanded or merely codified; whether the creditor's power amounts to a roving commission or exists only over particular chattels that are closely connected with the debt; whether the creditor's remedy was authorized by contract as well as statute; whether the creditor's resort to the remedy was mandatory or optional; whether the state extensively regulates the creditor's industry; and even whether title rests in the debtor or creditor) to varying degrees and with varying results. *See Culbertson* v. *Leland,* 528 F.2d 426 (9th Cir. 1975) ("innkeeper's" lien; state action); *Hall* v. *Garson,* 430 F.2d

430 (5th Cir. 1970) ("innkeeper's" lien; state action); *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975) ("innkeeper's" lien; no state action); *Anastasia* v. *Cosmopolitan National Bank of Chicago,* 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976) ("innkeeper's" lien; no state action); *Philips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975) ("garageman's" lien; no state action); *James* v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974) (repossession; no state action); *Adams* v. *Southern California First National Bank,* 492 F.2d 324 (9th Cir.), *cert. denied,* 419 U.S. 1006 (1974) (repossession; no state action); *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir.), *cert. denied,* 419 U.S. 1001 (1974) (bank's right of set-off; no state action); *Melara* v. *Kennedy,* 541 F.2d 802 (9th Cir. 1976) (enforcement of warehouseman's lien under California Commercial Code §7210; no state action).

Appellants here specify only two factors which point to state action in the warehouseman's enforcement of his lien. We conclude, however, that the combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action.

New York Uniform Commercial Code §7-210 provides the warehouseman with a truly extraordinary remedy. After giving the bailor specified notice, *see supra* n. 1, the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally.

The Supreme Court has already shown its grave concern over even temporary deprivations of property without

prior judicial determination of the amount owing in a series of cases challenging various provisional remedies afforded creditors. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). These cases stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. The statutory scheme before us, in contrast, contemplates no judicial—or even impartial—determination of the amount owing before a final deprivation of property.

This would be quite beside the point if the state were not implicated in the warehouseman's enforcement of his lien. But by enacting §7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, *see Shirley* v. *State National Bank of Connecticut, supra*, at 747 (Kaufman, *C.J.*, dissenting); *Bond* v. *Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974) (Kaufman, *C.J.*, dissenting), but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff.[11]

11 *Blye* v. *Globe-Wernicke Realty Co.*, 347 N.Y.S.2d 170 (1973). There, in finding that an innkeeper's enforcement of his lien pursuant to New York Lien Law §181 involves state action and violates due process, the New York Court of Appeals stated:

> In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52) traditionally has been the function of the Sheriff.

347 N.Y.S.2d at 175. *See* also *Sharrock* v. *Dell Buick-Cadillac, Inc.*, —— N.Y.S.2d —— (App. Div. 2d Dept., decided March 28, 1977).

We do not agree with Judge Werker's attempt to distinguish *Blye* on the ground that the liens referred to there all involve execution upon

This delegation expanded the warehouseman's remedies far beyond those existing at common law. There the warehouseman, in the absence of an express agreement authorizing sale upon default, could only retain the goods to coerce payment; he could not sell the goods and apply the proceeds to the debt. R. Brown, The Law of Personal Property §108, at 519, §119, at 588-89 (2d ed. 1955).[12] If mere detention of the goods failed to bring about payment, the warehouseman had to resort to the courts to obtain a judgment for the charges due and then deliver a writ of execution to the sheriff, who would sell the goods pursuant to the requirements of state law and deliver the proceeds to the warehouseman. *See* 62 N.Y. Jur. *Warehouse Receipts* §125, at 747, 747 n.2. Only in 1879[13] did the warehouseman for the first time become empowered to sell stored goods in satisfaction of delinquent charges.[14]

Appellees argue that the alteration of common law rights which took place is of little significance, citing the following passage from Burke and Reber, *State Action, Congres-*

goods having no particular relationship to the debt owing. A "conventional security interest" would include the typical purchase money security interest where the debt and security are fundamentally related.

Moreover, we are reluctant to rely heavily in the state action inquiry upon whether the property executed upon is closely connected to the alleged debt or not connected at all. This consideration bears only upon the extent of the intrusion upon the debtor's property rights that the state has authorized, and not upon whether the state has in fact delegated some of its sovereign power.

12 *See also Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y. Sup. Ct. 1832); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-45 (1900).

13 We note in passing that this was subsequent to the enactment of the fourteenth amendment.

14 *See* Ch. 336 [1879] N.Y. Laws 417. This statute underwent various amendments and reenactments, not here pertinent, before assuming its present form with the adoption of the Uniform Commercial Code in 1962. *See* Ch. 421, [1883] N.Y. Laws 592; Ch. 526, [1885] N.Y. Laws 891; Ch. 418, [1897] N.Y. Laws 514; Ch. 369, [1899] N.Y. Laws 793; Ch. 732, [1907] N.Y. Laws 1706; Ch. 588, [1949] N.Y. Laws 1339.

sional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1 (1973):

> The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.

Id. at 47.

We of course agree that an alteration in the common law remedy alone is not dispositive of the state action inquiry. But we reject the authors' conclusion that statutes such as §7-210 have only a minor impact on "private ordering."

Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judicially established, and then have the sheriff execute upon the goods which he concededly has the common law right to hold as security. The action of the state in granting the warehouseman the privileged position he enjoys under §7-210, even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested

judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment,[15] it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action.

The result we reach today accords with prior decisions of this circuit which conducted similar state action inquiries.

In *Shirley* v. *State National Bank of Connecticut, supra,* the plaintiff's automobile was peacefully repossessed by an assignee of the conditional seller, pursuant to a contractual provision. The plaintiff challenged the constitutionality of the Connecticut statute which authorizes such repossession if the sales contract expressly makes default a ground for retaking the property. In concluding that state action was not present, the court, with Chief Judge Kaufman dissenting, relied heavily on the fact that Connecticut creditors had a common law right to peaceful repossession without a hearing, and that the statutory enactment only increased protection of installment purchasers. Judge Mulligan reasoned that

> since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action. No delegation of traditional state power has been granted to any private person.

493 F.2d at 743.

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15 This value is nonexistent, however, when a private party wields power that belongs to the state and is subject to egregious abuse if not regulated.

In *Bond* v. *Dentzer, supra,* the same panel which decided *Shirley* faced a similar question: whether the unilateral filing of wage assignments by creditors with their debtors' employers, as authorized by the New York wage assignment statute and pursuant to specific loan agreements, constitutes state action. Once again the court, with Chief Judge Kaufman dissenting, found no state action, rejecting the plaintiffs' "partnership," "encouragement," and "traditional state functions" theories. The partnership argument fell because of the lack of state "entwinement" with the defendant finance companies. The other arguments failed because the state had "not deprived the plaintiffs of anything," 494 F.2d at 307:

> [T]he legislation does not vest the assignee with any function traditionally performed by the State. The function of the wage assignment has always been that of a private levy without a prior court order. There was never any requirement or practice which has been called to our attention which mandated the creditor to first establish the debt before attaching the wages and which the State has now abrogated. In fact, as our prior discussion indicates, the State has created a right on the part of the debtor to question the debt by initiating an action which was not known at common law. In sum, the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law.

494 F.2d at 311.

The distinctions between the facts of *Shirley* and *Bond* and those of the case at bar are manifest. In neither of those cases was there any expansion of common law creditors' remedies or delegation of power traditionally

exercised by the state—the precise factors which we deem determinative in the present state action inquiry.[16] *See also Tedeschi* v. *Blackwood, supra,* at 42 n.10.

In the most recent case on the subject in this circuit, *Tedeschi* v. *Blackwood, supra,* Judge Smith, writing for a three-judge district court in Connecticut, concluded that statutory provisions permitting the foreclosure by sale of a garageman's lien for towing and storage—analogous to §7-210—involved state action and violated due process.

The statutory scheme at issue in *Tedeschi* empowered a police officer or motor vehicle inspector who determined that a motor vehicle had been abandoned, unregistered, or dangerously parked to have the vehicle towed to a garage for storage. All towing and storage charges incurred became a lien on the vehicle which in time could be foreclosed by the garage through its sale of the vehicle. The statute did not, however, afford a right to a hearing to a person wishing to contest the application of either its towing or its lien provisions to his vehicle.

Judge Smith found state action present in the implementation of the towing provisions by virtue of a state agent's "meaningful participation" by initiating all such towings. He then ruled that state action was present in the creation of the garageman's lien because, rather than merely "acknowledging" the legality of private conduct, this statute "authorized" conduct which would otherwise be impermissible.[17] Finally, he concluded that

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16 A further distinguishing feature of both *Shirley* and *Bond* is that the courts there concluded that the creditors' remedies in question were specifically authorized by contracts underlying the debts. Contrast n.3, *supra.*

17 Judge Smith observed:

> While Connecticut common law may recognize the legality of a garage lien for services on a vehicle voluntarily surrendered for the performance of these services, it does not recognize such a lien where the garage has gained possession of the vehicle without the

> taken *by itself*, the foreclosure of a garagekeeper's lien pursuant to §14-150 to cover towing and storage charges also constitutes "state action," [18]

410 F. Supp. at 42 (emphasis added), and noted that in *Hernandez* v. *European Auto Collision*, 487 F.2d 378 (2d Cir. 1973), this court gave a strong indication that it would find such foreclosure or sale provisions unconstitutional.

The plaintiff in *Hernandez*, whose car was auctioned off by a garageman after he refused to pay for allegedly unauthorized repairs, challenged the pertinent sale provision of the New York Lien Law. Without expressly addressing the issue of state action, the court, in an opinion by Judge Wyzanski, ruled that, if the facts were as plaintiff claimed, he had a tenable contention that the lien law as applied violated the due process clause. It directed the district court to try the case on its merits. Judge Timbers, in a concurring opinion joined by Judge Lumbard, would have taken the further step of directing the district court to declare the sale provisions unconstitutional as applied if Hernandez were able to prove his allegations. 487 F.2d at 383.

Appellants here argue that state action was found *sub silentio* by the *Hernandez* court, and point out that the plaintiff in that case briefed the point on appeal. While

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owner's consent. *See Paton* v. *Robinson*, 81 Conn. 547, 554, 71 A. 730 (1909).

410 F. Supp. at 42.

18 Judge Smith may have qualified this conclusion somewhat when he observed later in his opinion:

> Thus, even if, when considered by itself, the implementation of the lien provisions did not result in "state action", it would still be infected by the "state action" resulting from the implementation of §14-150's towing provision.

410 F. Supp. at 43.

such a *sub silentio* jurisdictional ruling is not binding precedent in this court, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), we note Chief Judge Kaufman's dissent in *Shirley* v. *State National Bank of Connecticut, supra*, at 745-47, particularly his statement that the garageman's right of sale at issue in *Hernandez* did not exist at common law. *See also Sharrock* v. *Dell Buick-Cadillac, Inc., supra.*

We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara* v. *Kennedy, supra.* We have given that case due consideration, but we disagree with its conclusion and are unpersuaded by its analysis.

The case is reversed and remanded to the district court. On remand, the first question to be resolved is that of class determination,[19] because that may have an important bearing on the resolution of due process claims. Since the named plaintiffs in this case were consumers who stored personal belongings with Flagg Brothers and not merchants, the only constitutional challenge they can make individually is to §7-210(2), which authorizes enforcement of the warehouseman's lien upon goods "other than goods stored by a merchant in the course of his business." §7-210(1) is an entirely distinct provision which authorizes enforcement of the warehouseman's lien in the typical commercial warehousing situation, and defendant trade associations have raised a serious argument that a summary sale provision in this context may be constitutionally unobjectionable. *See D. H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). The constitutionality of §7-210(1) will not be before the court, however, unless commercial warehouses

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19 Leave is hereby granted for substitution of Jones' personal representative as plaintiff pursuant to Fed. R. Civ. P. 25(a). *See* n.7, *supra.*

are determined to be within a defendant class against which suit is brought by an appropriate class of plaintiffs.

Reversed and remanded.

HOLDEN, *District Judge*, dissenting:

I respectfully dissent. I am persuaded, as Judge Werker was, that his court was without jurisdiction and would affirm the dismissal of the action.

The unfortunate plight which confronted the plaintiff Brooks, following her eviction in June 1973, inspires concern. And Mrs. Jones was similarly situated when she was evicted in November of the same year. According to the complaints they were victimized by the overbearing of the defendant warehouseman. But on the facts alleged the State of New York was not a participant in the action taken by the defendant Flagg.

The defendant retained the bailed property under an ancient possessory lien conferred by the common law.[1] *See Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y.Sup. Ct. 1832); *cf. Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-645 (1900). *See also* R. Whitaker, A Treatise of the Law Relative to the Rights of Lien and Stoppage in Transitu 13-14 (1816). While the complaints speak of threats of sale, that drastic remedy was not applied; the property has been returned to both plaintiffs.[2]

The power of sale asserted by the defendant was first conferred on warehousemen by an enactment of the New

1 The common law remedy in New York gave the warehouseman a possessory lien on the stored goods until the storage charges were paid.

2 After the action was brought, by agreement of counsel, the plaintiff Brooks removed her goods without paying the storage charges. The plaintiff Jones' storage charges were paid with protest against the amount of the charges and the goods were removed.

York Legislature in 1879. Ch. 336 [1879] N.Y. Laws 417. Thus, for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges. The majority of the court concludes that the "statutory delegation of government power and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action." According to the majority, that thrust is sufficient to generate the judicial power to uproot a statutory provision that has governed the rights and remedies between warehousemen and their bailors for many years without interdiction by the courts of New York.

I agree that the question to be searched is whether the State of New York has become so involved in the retention and threatened sale of the plaintiff's goods that defendant's action "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co., supra* at 351. Without such participation the Fourteenth Amendment affords no protection. *Id.*

Of course a state can act only by way of its legislative, executive and judicial branches. *Ex parte Virginia*, 100 U.S. 339, 347 (1880). Here there is no suggestion of state participation by judicial action. To the contrary, it is the want of judicial action that is the predicate of the complaint. And the State's executive officers were not participants in either the creation of the lien or the threat to enforce it. The State quit the arena when the evictions were accomplished, before the present controversy began. The only state involvement is through the action of the legislature in adopting the challenged provisions of the Uniform Commercial Code § 7-210.

The question, as I perceive it, is whether the remedies provided by §§ 7-209 and 7-210 of the New York Uniform Commercial Code are "commanded" by the State, or "so

entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

The roots of the present controversy are embedded in private dealings between the warehouseman and the bailors of the property that was stored in the warehouse facility. No state agency or official has intervened to sell or threaten to sell the property entrusted by the plaintiffs to the defendant warehouseman. As to non-commercial storage, such as here involved, the Uniform Commercial Code merely retained the detailed provisions for notice, publication and public sale found in Section 33 of the Uniform Warehouse Receipts Act. Uniform Commercial Code § 7-210, Official Comment 1.

In *Shirley* v. *State National Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974), the court was concerned with state action in the context of the Connecticut Retail Installment Sales Financing Act. Writing for the majority, Judge Mulligan pointed out:

> Here the right to private repossession always existed. Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards to the consumer in the conditional sales contract.

Id. at 744.

By the law of New York the enforcement of a warehousman's lien, for nearly a hundred years, has not been the function of the sheriff. As will be seen from what is written in the margin, the historical background of the challenged statute tells us that the State of New York has not been significantly involved in the enforcement of the warehouseman's lien since 1879 unless, of course, either

the bailor or bailee elected to resort to judicial action. And the statute makes no "command" that §§ 7-209 and 7-210 shall be pursued as the warehouseman's exclusive remedy. *Compare Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). The statutory history of the contested provisions of the New York Uniform Commercial Code indicates that there has been an accretion of safeguards to the mutual benefit of the parties to the bailment. *Cf. Bond* v. *Dentzer*, 494 F.2d 302, 307-09 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank, supra*, 493 F.2d at 742.

Resolution of the question of government action "hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969).

Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute state action. *Bond* v. *Dentzer, supra. See Shirley* v. *State National Bank, supra*, 493 F.2d at 744.

Unlike the majority, I am persuaded that the adoption of § 7-210 of the New York Commercial Code does not constitute state action. The reasoning pursued in *Melara* v. *Kennedy*, 541 F.2d 802 (9th Cir. 1976) on the very question presented here, appears to me to be sound. *See also Smith* v. *Bekins Moving & Storage Co.*, 384 F.Supp. 1261 (E.D. Pa. 1974).

As we have seen, New York Uniform Commercial Code §§ 7-209 and 7-210 afford a choice of remedies to both bailor and bailee. The defendant warehouseman's exercise, or threatened exercise, of the power of sale allowed by the Code, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

SEPARATE OPINION OF HOLDEN, D.J., IN DISSENT, 553 F.2d at 775

[TITLE OMITTED IN PRINTING]

HOLDEN, *District Judge,* dissenting:

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The unfortunate plight which confronted the plaintiff Brooks, following her eviction in June 1973, inspires concern. And Mrs. Jones was similarly situated when she was evicted in November of the same year. According to the complaints they were victimized by the overbearing of the defendant warehouseman. But on the facts alleged the State of New York was not a participant in the action taken by the defendant Flagg.

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***Id.* at 744.**

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As we have seen, New York Uniform Commercial Code §§ 7-209 and 7-210 afford a choice of remedies to both bailor and bailee. The defendant warehouseman's exercise, or threatened exercise, of the power of sale allowed by the Code, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

COURT OF APPEALS JUDGMENT ENTERED ON OPINION IN NO. 75-7437

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. JAMES S. HOLDEN

HON. FREDERICK vanPELT BRYAN
District Judges

Shirley Herriot Brooks, Gloria Jones, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Flagg Brothers, Inc., individually and as representatives of a class of all others similarly situated, Henry Flagg, individually and as President of Flagg Brothers, Inc., The American Warehousemen's Association of the International Association of Refrigerated Warehouses, Inc., The Warehousemen's Association of New York and New Jersey, Inc., and The Cold Storage Warehousemen's Association of the Port of New York,

Defendants-Appellees.

Judgment of the Court of Appeals

75-7437

Filed
Apr. 7, 1977
A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk

Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

Nos. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., Individually and as Representative of a Class of All Others Similarly Situated, HENRY FLAGG, Individually and as President of FLAGG BROTHERS, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NOS. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., INDIVIDUALLY AND AS REPRESENTATIVE OF A CLASS OF ALL OTHERS SIMILARLY SITUATED, HENRY FLAGG, INDIVIDUALLY AND AS PRESIDENT OF FLAGG BROTHERS, INC., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, AND LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted on behalf of respondents in opposition to the petitions for a writ of certiorari filed in the related

proceedings, Flagg Brothers, et al. v. Brooks, et al, No. 77-25, Lefkowitz v. Brooks, et al., No. 77-37, and Flagg Brothers, et al. v. Brooks, et al., No. 77-42. All three petitions seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in Brooks v. Flagg Brothers, 533 F.2d 764 (2d Cir. 1977) (1a-30a). *

Respondents oppose the petitions for certiorari on the ground that the judgment of the court below is clearly non-final, and remands important questions of procedural due process and the scope of the plaintiff and defendant classes to the district court.

---

* References are to the Appendix to the Petition for a Writ of Certiorari in Flagg Brothers, et al. v. Brooks, et al., No. 77-25.

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(1a-2a, 8a, 25a-26a). See Point I, infra.

STATEMENT OF THE CASE

A. The Contested Statute.

Section 7-209 of the New York Uniform Commercial Code grants warehousemen possessory liens on goods in their possession for storage, transportation, insurance and other charges allegedly due. The contested statute, section 7-210 of the New York Uniform Commercial Code, grants warehousemen the power to enforce their liens by selling the goods if the owner does not pay the charges which the warehouseman claims are due.

Section 7-210, however, does not provide the owner of the goods with an opportunity to be heard at any time. It does not require the warehouseman to obtain judicial approval to sell the goods. Mitchell v. W. T. Grant Co., 416 U.S.

600 (1974). Indeed, the statute does not even require the warehouseman ever to bring an action on his claim. Plaintiff contends that section 7-210 authorizes a final and complete taking of a person's property in violation of the most fundamental principles of procedural due process. North Georgia Finishing Co. v. DiChem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., supra; Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Defendants contended in the courts below that the contested statute is constitutional because there is no state action and, that even if there is state action, section 7-210 comports with the requirements of the Due Process Clause.

B. Proceedings Below.

The complaint alleges, inter alia, that section 7-210 of the New York Uniform Commercial Code violates the Due Process

Clause of the Fourteenth Amendment. The resolution of this question involves two issues: (1) whether the enforcement of a warehouseman's lien constitutes state action; and (2) whether the warehouseman's enforcement of the lien by the sale of bailed goods, without affording the bailor-owner of the goods an opportunity to be heard, violates the Due Process Clause.

The district court held that state action was not present and therefore dismissed the action. Brooks v. Flagg Brothers, 404 F.Supp. 1059 (S.D.N.Y. 1975) (31a-47a). Finding no state action, the district court did not determine the due process question or the scope of the plaintiff and defendant classes.

Plaintiffs appealed the judgment dismissing the complaint to the United States Court of Appeals for the Second Circuit. That court determined that state action was present, reversed the district court's

judgment of dismissal and remanded the action to the district court to determine the due process question and the scope of the classes. Brooks v. Flagg Brothers, 553 F.2d 764 (2d Cir. 1977). The state action question was the only question on the merits which was decided by the court below. The court below did not reach the due process question and thus did not determine the constitutionality of the constested statute. Nor did the court below determine the proper scope of the plaintiff and defendant classes. Rather, these important questions were remanded to the district court. (1a-2a, 8a, 25a-26a).

Petitioners thus request this Court to review a non-final judgment and opinion of the Second Circuit Court of Appeals which leave open not only the resolution of an important constitutional question, but also the determination of the classes of

persons to be affected by the outcome of the action. In the present posture of this action, respondents contend that review should not be granted.

ARGUMENT

I

THE PETITIONS FOR CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT AND OPINION OF THE COURT OF APPEALS ARE NON-FINAL AND REMAND IMPORTANT QUESTIONS OF DUE PROCESS AND THE SCOPE OF THE CLASSES TO THE DISTRICT COURT.

Respondents contend that the petitions for certiorari should be denied because the judgment and opinion of the court below are non-final, and remand to the district court important questions of due process and the scope of the plaintiff and defendant classes. These questions should be resolved by the lower courts before this Court determines the state action question decided by the Court of Appeals.

Both Congress and this Court have consistently expressed a strong policy against piecemeal appeals. Switzerland Cheese Association v. E. Horne's Market, 385 U.S. 23, 24 (1966); Baltimore Contractors v. Bodinger, 348 U.S. 176, 178 (1955); Radio Station WOW v. Johnson, 326 U.S. 120, 123 (1945). This policy is embodied in the "dominant rule" in federal appellate practice, the final judgment rule. 9 Moore, Federal Practice, para. 110.06, p. 105, para. 110.08[1], p. 112. The rule against appeals from non-final judgments is not a mere "technical concept", but "an historic characteristic of federal appellate procedure," which "is the means for achieving a healthy legal system." Cobbledick v. United States, 304 U.S. 323, 324-326 (1940).

While there is no statutory requirement of finality when certiorari is sought

to review a judgment of the United States Court of Appeals, 28 U.S.C. section 1254, this Court has consistently recognized that the lack of finality generally dictates that certiorari be denied. Brotherhood Locomotive Firemen v. Bangor & Aroostook RR., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916); Denver v. New York Trust Co., 229 U.S. 123, 133 (1912); The Conqueror, 166 U.S. 110, 113-114 (1897); American Construction Co. v. Jacksonville T. & W. R. Co., 148 U.S. 372, 384 (1893); Stern and Gressman, Supreme Court Practice, section 4.19, p. 180 (4th ed. 1969). In American Construction Co. v. Jacksonville T. &. W. R. Co. supra at 384, this Court stated:

> "Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the circuit court of

> appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

And, this Court has specifically held that the lack of finality "of itself alone furnishe[s] sufficient ground for the denial of the application [for writ of certiorari]." Hamilton-Brown Shoe Co. v. Wolf Brothers, supra at 258.

Petitioners Flagg Brothers and Flagg refer to "[t]he technical nonfinality of the Court of Appeals judgment...." (Petition for a Writ of Certiorari, Flagg Brothers, et al. v. Brooks, et al., No. 77-25, p. 5). Far from being technically nonfinal, the judgment of the court below remands to the district court a significant question of procedural due process, as well as important questions concerning the scope of the plaintiff and defendant

classes. Following the determination of these questions by the lower courts, review on these questions will undoubtedly be subsequently sought in this Court. In this posture, it is not proper to grant certiorari:

> "Of course, where the remaining litigation may raise other federal questions that may come here,...to allow review of an intermediate adjudication would offend the decisive objections to fragmentary reviews." Radio Station WOW v. Johnson, 326 U.S. 120, 127 (1945). *

This is not a case where the Court of Appeals has determined the constitutionality of a contested statute and only remanded a question of procedure or remedies to the

---

* While Radio Station WOW involves an appeal from a state court, the principle is equally applicable when certiorari is sought to review a judgment of the United States Court of Appeals in view of this Court's general policy against piecemeal appeals.

district court. Cf. City of New Orleans v. Dukes, 96 S.Ct. 2513, 2516 (1976). Nor is this a case where the final result is "no more than a few formal gestures...." Mills v. Alabama, 384 U.S. 214, 217 (1966). On the contrary, petitioners have vigorously argued in the courts below that even if state action is present, the contested statute does not violate the Due Process Clause. Compare Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973) with Magro v. Lentini Bros. Moving and Storage Co., 338 F.Supp. 464 (E.D. N.Y. 1971), aff'd, 460 F.2d 1064 (2d Cir.), cert. denied, 406 U.S. 961 (1972). This is thus a case where the court below decided only one of the two constitutional questions which must be resolved in order to determine the constitutionality of the contested statute, i.e., the state action question, and remanded the second question,

i.e., the due process question, to the district court.

The instant case is clearly distinguishable from the cases relied upon by petitioners Flagg Brothers and Flagg, Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); Land v. Dollar, 330 U.S. 731 (1947) and United States v. General Motors Corp., 323 U.S. 373 (1945). (Brief for Petitioners Flagg Brothers and Flagg, No. 77-25, p. 5). In each of these cases, this Court reviewed an interlocutory order of the Court of Appeals because that order presented the only federal question in the case worthy of Supreme Court review. It was wholly improbable that another substantial federal question would arise in the course of subsequent proceedings which would be worthy of review in this Court. In this context, this Court regarded the federal question

presented by the petition for certiorari to review the interlocutory order as "fundamental to the further conduct of the case." United States v. General Motors Corp., supra at 377.

In contrast to the above cited cases, the petitions for certiorari in the present case do not seek review of the only significant federal question. On the contrary, the remand of the Court of Appeals directs the district court to determine an important question of procedural due process.

Petitioners have not set forth any reasons why certiorari should be granted at this time. They have made no attempt to show that review is necessary to prevent "extraordinary inconvenience and embarrassment." American Construction Co. v. Jacksonville T. & W. R. Co., supra at 384. Since the court below did not grant plaintiffs any relief, petitioners are unable to show that

they will suffer irreparable injury or injustice from its decision. Cf. Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 584-585 (1952).

In addition, a denial of certiorari by this Court at this time will not deprive petitioners of the opportunity to litigate the state action issue in this Court. The state action issue will be properly before this Court when review is sought from a final judgment of the Court of Appeals. When review is sought from a final judgment, this Court "is called upon to notice and rectify any errors that may have occurred in the interlocutory proceedings." Hamilton-Brown Shoe Co. v. Wolf Brothers, supra at 258-259. Accord, Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 (1973); Toledo Scale Co. v. Computing Scale Co.,

261 U.S. 399, 418 (1923). * Since the court below did not grant any relief against petitioners, and since petitioners will not be precluded from raising the state action issue when review is sought from a final judgment, petitioners are unable to demonstrate that they will be harmed in any way if this Court denies review at this time.

The state action question should not be decided by this Court in a vacum, but only after the lower courts have determined the due process question and the scope of the classes. These issues are at least to some extent interrelated. The court below stated that on remand, "the first question to be resolved is that of class determination,

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* Indeed, should the Court of Appeals subsequently hold the contested state statute unconstitutional, review would be by appeal and within this Court's mandatory jurisdiction. 28 U.S.C. section 1254(2).

because that may have an important bearing on the resolution of due process claims." Brooks v. Flagg Brothers, supra at 774 (25a). This is because the due process question may be decided differently for merchant bailors than for consumer bailors. Brooks v. Flagg Brothers, 533 F.2d supra at 72 (25a). Compare New York Uniform Commercial Code, section 7-210(1) with New York Uniform Commercial Code, section 7-210(2). Compare, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972) with D. H. Overmyer v. Frick Co., 405 U.S. 174 (1972). See Memorandum of Warehousemen's Association of New York, et al. in Support of the Three Petitions for a Writ of Certiorari, p. 4.

The manner in which the lower courts resolve the class action and due process questions may in turn be significant in this Court's ultimate resolution of the state action question. For example, if the lower

courts hold that merchants who store goods are not properly members of the plaintiff class, it will be unnecessary, and indeed improper, for this Court to decide the state action and due process questions with respect to subdivision one of section 7-210 of the New York Uniform Commercial Code.

In addition, an important factor in determining the state action question is whether or not there exists a valid contractual provision which authorizes the warehouseman to sell bailed goods. See, e.g., Bond v. Dentzer, 494 F.2d 302 (2d Cir.), cert. denied, 419 U.S. 837 (1974); Shirley v. State National Bank, 493 F.2d 739 (2d Cir.), cert. denied, 419 U.S. 1009 (1974); Adams v. Southern California First National Bank, 493 F.2d 739 (2d Cir.), cert. denied, 419 U.S. 1006 (1974). Whether such valid contractual authorization exists may depend upon whether the bailor is a merchant or a

consumer. Compare, Fuentes v. Shevin, supra with D. H. Overmyer Co. v. Frick Co., supra. The lower courts should resolve these questions before this Court determines the state action issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

DATED: White Plains, New York
August 18, 1977

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In The

Supreme Court of the United States

October Term, 1977

No. 77-25

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1977

No. 77-25

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

BRIEF FOR PETITIONERS IN REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTORY STATEMENT

Petitioners, FLAGG BROTHERS, INC., and HENRY FLAGG, submit this brief in reply to the brief submitted by respondents, SHIRLEY HERRIOTT BROOKS and GLORIA JONES, opposing the petition for writ of certiorari filed by petitioners in No. 77-25.

ARGUMENT

I.

There is no requirement that a decision of the Court of Appeals must be final in terminating an action in order that it be reviewable by the Supreme Court by writ of certiorari.

In their brief to this Court respondents urge that certiorari be denied due to nonfinality of the decision of the Court of Appeals below.

As respondents concede, however (Brief for Respondents in Opposition, 8-9), there is no statutory requirement of finality when certiorari is sought to review a judgment of the United States Court of Appeals. The controlling statute, 28 U.S.C. §1254, Subs. (1), makes this expressly clear, providing:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree;* . . . ." (Emphasis added.)

A judgment is not final until entered in the court docket, *Green v. Van Buskerk,* 70 U.S. 448; 9 J. Moore, "Federal Practice", par. 110.08(2) at 119 (2d Ed. 1953). In authorizing issuance of the writ of certiorari even before the Court of Appeals has rendered its judgment, and, *a fortiori,* before an announced judgment has been entered in the Court of Appeals docket so as to become final, it is clear that the statute contemplates and allows Supreme Court review of a case by certiorari before a final decision of the Court of Appeals.

That nonfinality is no bar to the Court's review, no matter

what the stage of litigation, is demonstrated by the history of §1254 and by cases interpreting it. An earlier version of Subsection (1) of §1254 contained the following additional provisions, omitted in subsequent revisions:

> ". . . with the same power and authority and with like effect, as if the cause had been brought there by *unrestricted* writ of error or appeal." (Emphasis added.)

See *Gay v. Ruff,* 292 U.S. 25, 31 n. 7 (1934). The term "unrestricted" is also used in the "Revisor's Note" to 28 U.S.C. §1254, 28 U.S.C.A., "Judiciary and Judicial Procedure §§1251 to 1291" at 50 (West 1960):

> "The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of *unrestricted* review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted." (Emphasis added.)

Thus, in *American Construction Co. v. Jacksonville, T. and K.W. Ry.,* 148 U.S. 372 (1893), the very case quoted by the respondents in support of applicability of the finality rule to the Court's power to grant certiorari (Brief in Opposition, 9-10),[1] the Court said, at 148 U.S. 385:

> "There is nothing in the act to preclude this court from ordering the whole case to be sent up . . . at

1. The passage of the decision quoted by respondents had reference only to interlocutory orders granting or continuing an injunction. On this same basis can be distinguished other cases cited by respondents which concern themselves with the equitable jurisdiction of the court of first resort to grant an injunction rather than with the appellate powers of the Court of last resort to supervise the uniform administration of justice in the federal judiciary. See *Denver v. New York Trust Co.,* 229 U.S. 123 (1913); *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

as early a stage as when such questions have been so certified.

* * *

(T)he question at what stage of the proceedings, and under what circumstances the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require."

The Court was even more emphatic in *Forsyth v. Hammona* 166 U.S. 506, 513 (1897), in interpreting the provision of the Circuit Court of Appeals Act of 1891 (Ch. 517, 26 Stat. 826) that eventually became §1254, Subsection (1):

"Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to rest in this Court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, ..."

A good illustration of this "comprehensive power" conferred upon the Supreme Court to issue writs of certiorari is provided by *Gay v. Ruff, supra,* 202 U.S. at 29-31, and *Aetna Casualty & Surety Co. v. Flowers,* 330 U.S. 464, 467 (1947), wherein the Court held that a provision of the Judiciary Code, now codified at 28 U.S.C. §1447(d), declaring nonappealable a Federal District Court order remanding a case to a state court from which it was removed, did not limit or restrict the Supreme Court's "extensive" power under what is now §1254(1) to review such an order on writ of certiorari.

The sweeping language of the cases interpreting §1254 and recognizing the Supreme Court's power to review at any stage it deems appropriate is illustrated in *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974). In that case, which in an eight-year history had never been tried, had been appealed to the Court of Appeals three times after being twice in the District Court, and which presented to the Supreme Court a distinctly nonfinal order of the Court of Appeals denying class action status, the Supreme Court granted certiorari. 414 U.S. 908 (1973).

In its decision on the merits of the *Eisen* appeal, the Court did treat the finality rule, but only in reference to the appellate jurisdiction of the Court of Appeals below to review the District Court's orders. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at 169-172. Likewise, in the passages of Professor Moore's treatise on federal practice cited by respondents on page 8 of their brief, the "dominant final judgment rule" is discussed, but only in reference to the appealability of decisions of the Federal District Courts to the Courts of Appeals under 28 U.S.C. §§1291 and 1292. Section 1291's express statutory requirement of finality of the District Courts' decisions, in order to be reviewable by the Courts of Appeals, with exceptions as to certain interlocutory orders set forth in §1292, is not to be found in §1254(1) governing the Supreme Court's power of review over decisions of the Courts of Appeals.

It is petitioners' position that this omission is deliberate and that there is no requirement of finality of a Court of Appeals decision in terminating an action in order for it to be reviewable by writ of certiorari. See *City of New Orleans v. Dukes,* 427 U.S. 297, 301-302 (1976). Respondents have cited no precedent to support the Court's refusal to exercise its jurisdiction under §1254(1) simply and solely because the Court of Appeals decision sought to be reviewed herein is not final in remanding other, unresolved issues to the District Court.

Most of respondents' "final judgment" cases and

authorities are totally inapposite, not being concerned with the appellate jurisdiction of the Supreme Court over the Courts of Appeals. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 252, 258 (1916) and *Brotherhood of Locomotive Firemen and Enginemen v. Bangor E. Aroostook Rd.*, 389 U.S. 327 (1967) merely recognize the Supreme Court's discretion to grant or deny petitions for certiorari.[2] These cases are only authority that the Court can refuse a writ on nonfinality grounds, not, as respondents contend, that it must or should do so. "Our power to grant writs of certiorari extends to interlocutory as well as final decrees," *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 410 (1923) (per Taft, C.J.).

Whether the Court should grant petitioners' writ to review the nonfinal judgment of the Court of Appeals below depends upon the considerations discussed in Point II of petitioners' brief, *infra*.

II.

The judgment of the Court of Appeals below meets the controlling test for granting review by certiorari.

The question of what is a final judgment does not turn upon whether there are any substantial federal questions remaining to be decided by the courts below. Rather, the Supreme Court has called for more of a "pragmatic approach" to the question, *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962), in which the "requirement of finality is to be given a practical rather than a technical construction." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-153; *Cohen v. Beneficial*

2. In *Hamilton-Brown Shoe Co.* the writ was denied, not only because the Court of Appeals decree was nonfinal, but also and equally because it "involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits." 240 U.S. at 258. Such questions and conflicts, however, are in the instant case, as brought out in the petition for certiorari at 5-10.

Industrial Loan Corp., 337 U.S. 541, 546. In *Gillespie*, this Court said:

> "Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs or (sic) piecemeal review on the one hand and the danger of denying justice by delay on the other.'"

The instant case fits exactly within the *Gillespie* mold. As was noted there, petitioners' case is now before the Court. Denial of the instant petition will result in incurring substantial costs and efforts in litigating the case in the District Court and in the Court of Appeals in order to be able to return to this Court. On the other hand, a determination of the threshold question of state action at this time may be dispositive of the case. If state action does not exist then all of the remaining issues are academic and the time, expense and burden on the court system by following the circuituous course urged by respondents would be wasted. If state action is present, a finding by this Court at this time would simplify the work of the courts and the parties on the remand. Review at this juncture thus comports with the pragmatic and practical approach discussed in the cases.

An equally compelling reason for granting certiorari is that delay in resolution of the state action issue will result in a denial of justice by perpetuating the present irreconcilable conflict on the legality of the warehousemen's right of summary lien sale pursuant to Uniform Commercial Code §7-210(2). Under the current case law prevailing in states subject to the jurisdiction of the Court of Appeals for the Ninth Circuit, household goods warehousemen may engage in summary sale of storage lots to satisfy unpaid charges, without any prior judicial intervention. *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. Aug. 2, 1976), *reh.*

and reh. en banc denied (Oct. 8, 1976). But in those states subject to the jurisdiction of the Court of Appeals for the Eighth Circuit household goods warehousemen engaging in this collection practice would be liable in damages for conversion and also under the Civil Rights Act, 42 U.S.C. §1983, for violation of the depositor's federal constitutional right of due process. *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 354 F.2d 356 (8th Cir. May 12, 1977), *reh. denied* (June 9, 1977). As for the states subject to the jurisdiction of the Court of Appeals below, household goods warehousemen may proceed to sale but are apprehensive to do so in light of the pendency of the instant challenge to the lien sale statute, particularly since they may become defendants in the action by their inclusion in a defendant class certified under Fed. R. Civ. P. 23.

Throughout the rest of the country household goods warehousemen are in a state of limbo, having the right to sell but reluctant to proceed until there has been a dispositive decision resolving the conflicts among the circuits on the state action issue. It is unjust for both the warehousemen and the public they serve to be afforded different and opposing rights with regard to the disposition of household property depending upon where they live. As the ultimate interpreter of the federal Constitution and laws, the Supreme Court should immediately rectify this anomaly. The reasons why this Court should grant certiorari to resolve the conflict among the circuits equally support the necessity for resolving the conflict at the earliest possible opportunity.

Further, a refusal to grant certiorari on finality grounds would deny justice to all those persons who, between the denial of certiorari and any later time when certiorari may be granted and the issue finally decided in petitioners' favor, bring an action under the Civil Rights Act and the Fourteenth Amendment, relying upon the novel theory of state action propounded by the

Second Circuit.[3] Already at least one such case, involving the identical same challenge to the statute under attack here, has been instituted. *Svendsen v. Smith's Moving and Trucking Co.*, No. 77 N 2863 HFW(S.D.N.Y. filed 6/13/77). Justice will be denied to these parties, including plaintiffs who will have gone to the trouble and expense of bringing the actions and defendants who will have been compelled to defend them, by delaying the review and reversal of the Second Circuit's ruling on this important and difficult constitutional law question. *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954).

Opposing respondents are incorrect in contending that the validity of the contract between the parties, authorizing the warehouseman to sell the plaintiff's goods in default of payment, has not been passed upon below (Brief in Opposition, 18-19). The District Court held that it did not matter whether or not the contractual agreement entered here was valid, as absence of state action was overriding. *Brooks v. Flagg Brothers, Inc.*, 404 F. Supp. 1059, 1066-67 (S.D.N.Y. 1975) (Petition for Certiorari, Appendix, 41a-42a). The Court of Appeals concluded that the contract between plaintiff BROOKS and the petitioners was invalid, under *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), and accepted plaintiff JONES' allegation in her complaint, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that she never had any agreement on the storage of the goods. *Brooks v. Flagg Brothers, Inc.*, 553 F.2d 764 (2d Cir. April 7, 1977) (Petition for Certiorari, Appendix, 9a, n. 3). Thus, there is no need for class determinations to resolve a matter which the courts below have resolved.

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3 The concept that the Legislature's conferral of dispute-resolving authority upon private parties constitutes state action had its genesis in the Second Circuit in two prior dissenting opinions of Chief Judge Irving Kaufman, which the court below adopted and elevated to the rule of the circuit. *Brooks v. Flagg Brothers, Inc.*, 553 F.2d 764, 771 (2d Cir. April 7, 1977) (Petition for Certiorari, Appendix, 18a).

CONCLUSION

The technical lack of finality of the decision of the Court of Appeals below is not a bar to Supreme Court review by certiorari. The Supreme Court has indicated in its past decisions a willingness to review nonfinal decisions on issues which are fundamental to the further conduct of the case. Whether the Court will exercise its discretion to review such an issue in a particular case depends on practical considerations of the interests of justice and the convenience and costs of litigation to the parties and the courts.

Under these considerations, the decision of the Court of Appeals below, finding state action present in a warehouseman's sale of stored household goods pursuant to statute, is immediately reviewable by the Court and should be reviewed. The petition in No. 77-25 for issuance of writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
September 6, 1977

Respectfully submitted,

s/ Alvin Altman

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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

-and-

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-and-

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

-and-

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS FLAGG BROTHERS, INC., and HENRY FLAGG

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In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., etc., *et al.*,
Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRI. ERATED WAREHOUSES, INC.,
Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS FLAGG BROTHERS, INC. and HENRY FLAGG

JURISDICTION

Petitioners, FLAGG BROTHERS, INC. and HENRY FLAGG invoke the jurisdiction of the Supreme Court under 28 U.S.C. Section 1254(1).

The judgment sought to be reviewed was entered April 7, 1977 (A192a).[1] Petitioners filed their petition for certiorari on July 5, 1977 and the Supreme Court granted the petition on October 3, 1977. *Brooks v. Flagg Brothers, Inc.*, ____ U.S. ____, 46 U.S.L.W. 3215 (Oct. 4, 1977).

OPINIONS BELOW

1. The opinion of the Second Circuit finding state action in a warehouseman's lien foreclosure sale pursuant to N.Y.U.C.C. §7-210 is reported at 553 F.2d 764 (April 7, 1977) and in the Appendix beginning at page 159a.

2. The opinion of the United States District Court for the Southern District of New York, finding state action absent in a warehouseman's lien foreclosure sale, is reported at 404 F. Supp. 1059 (1975) and in the Appendix beginning at page 141a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, and the following federal and state statutes: 28 U.S.C. §1343(3); 42 U.S.C. §1983; and N.Y.U.C.C. §7-210, in 62½ McKinney's Cons. L. of N.Y. Ann., Pt. 3, at 55-57 (Ed. Thompson Co. 1964).

All of these provisions are set forth in their entirety in the appendix to this brief, marked Appendix A.

1. References to the single appendix filed on this review will be designated by (A___a).

QUESTIONS PRESENTED

1. Is the "state action" requisite under the Fourteenth Amendment due process clause and under 42 U.S.C. §1983, prohibiting deprivation of a federally protected right while acting "under color of" state law, present in the enforcement of a lien by a warehouseman after default in payment of storage charges as permitted under New York Uniform Commercial Code §7-210?

2. Is a New York warehouseman's right of lien foreclosure sale in satisfaction of delinquent storage charges under the Uniform Commercial Code and its predecessor statutes an exercise of a power traditionally associated with sovereignty which has been delegated to the warehouseman by the state so as to bring the sale within the purview of the Fourteenth Amendment as the action of the state?

STATEMENT OF THE CASE

A. The Contested Statute

This case involves the constitutionality, under procedural due process, of the creditor collection remedy of summary sale of collateral, as made available to a warehouseman in New York. Section 7-210 of the Uniform Commercial Code, enacted in New York as N.Y.U.C.C. §7-210, permits a warehouseman to satisfy his statutory lien (§7-209) for delinquent storage charges by selling the goods in storage without prior court action. Subsection (2) of the statute requires the warehouseman of household goods to observe detailed notification, publication and sales procedure requirements in order to foreclose his lien.[2]

The full text of N.Y.U.C.C. §7-210 is reproduced in Appendix A to this brief, *infra*. Appendix B shows where §7-210

2. N.Y. U.C.C. §7-210 and Official Comment 1, in 62½ McKinney's Laws, Pt. 3, *supra*, at 55-57, 58.

may be found in the statutes of the 49 states, the District of Columbia and the Virgin Islands, all of which jurisdictions have adopted the Code provisions, intact and verbatim except for minor differences in some states basically pertaining to the manner of mailing the sales notice. These local variations are all noted in Appendix B hereto.

B. The Petitioners

Petitioner FLAGG BROTHERS, INC. (hereinafter "FLAGG BROTHERS") is a New York corporation engaged in the business of household moving and storage and maintains an office and place of business in Mount Vernon, Westchester County, New York. Petitioner HENRY FLAGG is the president of FLAGG BROTHERS (A98a). The record demonstrates that petitioner FLAGG, far from being a titular head of a large corporation, actively participates in the business, daily carrying out functions of salesman and business manager in addition to discharging executive responsibilities (A11a-13a, 20a-21a, 24a-25a).

Petitioner FLAGG BROTHERS holds a certificate issued by the New York State Department of Transportation authorizing it to transport household goods as a common carrier of property by motor vehicle within the New York City Commercial Zone. The law requiring such licensing has no application to the storage business.[3]

3. N. Y. Transportation Law §162(1), applicable only to a "common carrier of property by motor vehicle." The term "common carrier of property by motor vehicle" is defined at Transp. L. §2, subd. 15, as "a person or corporation undertaking. . . to transport property or any class thereof, for the general public by motor vehicles for compensation. . . within a defined territory. . ." The New York City Commercial Zone is defined by Department of Transportation regulations at 17 N.Y.C.R.R. §850.1 (1974). An Assembly bill introduced in the New York State Legislature in its last regular session provided for regulation of household goods storage by the Department of Transportation. A. 4505, 200th New York Legislature, regular session (Feb. 8, 1977). It was not enacted.

Nothing in the record shows the warehouse facilities used by FLAGG BROTHERS are other than privately owned and managed without governmental subsidy or other support. The facilities are not shown to be physically or financially integrated with any governmental project or publicly dedicated property.

In short, the record shows FLAGG BROTHERS is a private corporation with the normal duties and privileges attendant to such status.

C. Respondent Brooks

The verified complaint of respondent, SHIRLEY HERRIOTT BROOKS, alleges that on June 13, 1973, respondent, then residing in the City of Mount Vernon, Westchester County, New York, was evicted from her apartment. On the same day she engaged petitioners' services who removed her household belongings from the sidewalk and stored them in storage space maintained by petitioner FLAGG BROTHERS (A10a-11a). Although some money was paid by respondent a dispute arose as to the charges due.

On or about August 25, 1973 respondent BROOKS received a letter dated August 22, 1973 from petitioner FLAGG demanding payment of delinquent storage charges within 10 days to avert a foreclosure sale. A "Final Notice" form in the same tenor, bearing date of August 22, 1973, accompanied the letter (A12a-13a, 20a-21a). The letter and "Final Notice" did not comport with the notification prerequisites of §7-210(2)(c). The threatened sale was not carried out.

D. Respondent Jones

The intervenor's complaint of respondent, GLORIA JONES, alleges that on November 26, 1973, the respondent was evicted from her apartment in the City of Mount Vernon, Westchester County, New York. The complaint further alleges

that without any written or oral authorization from respondent, employees of petitioner FLAGG BROTHERS, in respondent's presence, removed her household belongings from the sidewalk onto a company truck for removal to a storage facility maintained by petitioner FLAGG BROTHERS. Respondent JONES' storage charges were paid by the Westchester County Department of Social Services until January 31, 1974, when the Department informed respondent that it would not pay for her storage after that date (A45a, 102a, 106a).

In March, 1974 respondent JONES contacted petitioner FLAGG BROTHERS, at which time she was advised that her account was in arrears some $600. She was also informed that her goods were on the verge of being sold (A46a).

There was further contact between respondent and petitioners, but no payment for the storage was made or tendered by her. Responent's household belongings were not sold.

E. Prior Proceedings

On September 20, 1973 respondent BROOKS commenced this action as a class action in the United States District Court for the Southern District of New York, contending that the threatened sale of her household goods by petitioners pursuant to N.Y.U.C.C. §7-210 in satisfaction of charges, without hearing prior to sale, violated her right under the Fourteenth Amendment against deprivation of property without due process of law. Respondent sought declaratory relief and, under 42 U.S.C. §1983, a permanent injunction and damages against the petitioners, named as individual defendants and as representatives of the class of all warehousemen in the state who impose liens and sell encumbered goods pursuant to N.Y.U.C.C. §§7-209 and 7-210. Jurisdiction of the District Court was invoked under 28 U.S.C. §1343(3).

On April 10, 1974, petitioners filed an answer denying the presence of state action requisite to sustain a claim under 42 U.S.C. §1983 and the Fourteenth Amendment (A35a-36a).

Thereafter, the Attorney General of the State of New York, American Warehousemen's Association, The International Association of Refrigerated Warehouses, Inc., Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York were permitted to intervene as defendants pursuant to Fed. R. Civ. P. 24(b). By the same District Court order respondent JONES was permitted to intervene as a plaintiff.[4]

Respondents then moved for a class action determination under Fed. R. Civ. P. 23 and for summary judgment declaring the unconstitutionality of N.Y.U.C.C. §7-210. Petitioners cross-moved to dismiss the complaints for failure to state a claim under the Fourteenth Amendment and §1983, pursuant to Fed. R. Civ. P. 12(b)(6).

On July 7, 1975 the District Court issued its opinion and order denying respondents' motion for summary judgment and granting petitioners' cross-motion to dismiss the complaints. No ruling was made on the class action determination. *Brooks v. Flagg Brothers, Inc., supra,* 404 F. Supp. 1059 (A141a). The District Court found that there was insufficient state involvement in the enforcement of a warehouseman's lien to confer jurisdiction upon a Federal District Court under §1343(3) or to state a claim for relief under 42 U.S.C. §1983.

Respondents appealed to the Second Circuit, which by a divided vote reversed the District Court's dismissal and remanded the case to the District Court for class action determination and for a determination on the issue of due process. *Id.,* 554 F.2d 764 (April 7, 1977) (A159a). The majority

4. *Brooks v. Flagg Brothers, Inc.,* 63 F.R.D. 409 (S.D.N.Y. 1974), reprinted in Petition for Certiorari in No. 77-37, at 47a.

panel held that the warehouseman's right of summary sale represented the delegation to the warehouseman of "distinctly governmental power", the power of "binding conflict resolution". The majority defined this power of binding conflict resolution as the power of the warehouseman to "finally and unilaterally" resolve disputes with customers over storage charges. The statutory delegation of binding conflict resolution to warehousemen creditors, coupled with the historical fact that the power of sale did not exist at common law, was in the majority's opinion sufficient state involvement in a warehouseman's lien sale to constitute the sale as the action of the state. *Id.* at A173a.

The dissenting judge below agreed with the District Court's opinion that the enforcement of a warehouseman's lien was never a public function and that the requisite significant degree of state involvement in essentially private conduct is not present in the case of a warehouseman's lien sale. *Id.* at A187a.

Thereafter, petitioners filed their petition to this Court for writ of certiorari to review the Second Circuit's decision. The petition was granted on July 5, 1977.

F. The Legislative History of N.Y.U.C.C. §7-210

The New York warehouseman's lien sale statute has a long history. While the right of sale itself first appears as a general law in 1879, the right of sale as a statutorily-created warehouseman's remedy goes back at least to 1859, 10 years before warehouses were allowed to do business in the state in corporate form (without a special legislative enactment, or charter law), Cary On Corporations (4th Ed. 1969) at 3-4,[5] Ch.

5. Ch. 605 (1869) N.Y. Laws 1443, allowing the business of warehousing to be conducted in corporate form.

The earliest New York statute conferring a right of sale to a private party uncovered by counsel's researches is Ch. 282 (1854) N.Y. Laws 608, allowing (Cont'd)

405 (1859) N.Y. Laws 944 was a legislative enactment chartering the "United States Warehouse Company" to engage in "carrying on the business of warehouseman" as a corporation. Section 3 of the charter act provided in part:

> "The said corporation is hereby authorized to receive and collect the usual and customary rates of dockage, . . . together with all charges and expenses incurred for labor or otherwise in the receipt, delivery or custody of merchandise received by or stored with them; and advances . . . with interest and commissions at the usual and customary rates.
>
> All of which charges, expenses, advances, interest and compensation as above specified, shall be a lien on said merchandise, and in case the same shall be in arrears and unpaid or the goods be unclaimed for one year, the said goods, . . . may be sold at public auction, thirty days' public notice of the time and place of such sale being given, by publication in at least three of the daily papers printed in the town or city where the operations of this corporation may be carried on."

Subsequent charter enactments establishing warehouse corporations contained provisions conferring the right of sale in

(Cont'd)

railroad companies to sell unclaimed freight in their possession one year, upon meeting specified notice requirements. This 123-year-old right of summary liquidation of abandoned property still is in force today, N.Y. Rd. L. §68, and is extended to freight and baggage left on the lines of water carriers, Gen. Bus. L. §§281-82, and express companies, Gen. Bus. L. §285.

enforcement of the warehouse company's lien for unpaid charges.[6]

In 1879 the New York State Legislature passed "An act to enable warehousemen to collect their charges upon goods deposited with them by the sale thereof."[7] The Session Laws page containing the act is set forth as Appendix C to this brief. An important feature of this seminal act was a precondition that the storage charge be two years overdue and that the period of storage end at least six months prior to noticing the sale.[8]

In 1897 the Legislature redistributed and further codified the miscellaneous creditor's lien statutes enacted to that date, including the warehouseman's lien sale statute, into a single title of the consolidated laws becoming the Lien Law.[9]

In 1907, New York adopted the Uniform Warehouse Receipts Act, which at §33 pared away a separate lien sale right for warehousemen from the right of sale to satisfy a lien on personal property previously enacted as Lien Law §80.[10] Section 33 of the Warehouse Receipts Act was codified as §118 of the

6. Ch. 404, §3 (1859) N.Y. Laws 940 ("Staten Island Warehousing Co."); Ch. 378, §§6, 8, 9 (1867) N.Y. Laws ("The Commercial Warehouse Co. of New York"); Ch. 800, §§6, 8, 9 (1868) N.Y. Laws 1789 ("Commercial Warehouse Co. of Albany").

7. Ch. 336 (1879) N.Y. Laws 417.

8. *Id.*, §1.

9. Ch. 418 (1897) N.Y. Laws 514. Examples of the sales remedies covered by this major enactment, a harbinger of the adoption of the Uniform Commercial Code 65 years later, are: Warehouseman's right of sale; Hotel and innkeepers, lodging house and boarding house keepers (§80); Factors as commission agents (§80); Conditional sale, right of resale by vendor (§§110-118); Chattel mortgagee, right of strict foreclosure (§§90-98).

10. Ch. 732 (1907) N.Y. Laws.

Gen. Bus. L.,[11] and except for a minor amendment with respect to the place of sale remained the law in New York until 1962.

In 1962, New York adopted the Uniform Commercial Code including §7-210 thereof, the statute challenged in this action.[12]

SUMMARY OF ARGUMENT

I. The primary purpose of the Fourteenth Amendment and of 42 U.S.C. §1983 was to eradicate racial discrimination through enforcement of the equal protection guaranty against ostensibly private persons. *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961). At the same time that the civil rights laws were being enacted, a legislative movement was underway in New York and other states to codify and extend to other creditors, including the warehouseman, the common law right of certain creditors to summarily sell encumbered goods to satisfy unpaid sales prices, service charges and outstanding loans. This statutory movement is represented today in adoption of the Uniform Commercial Code by 49 states, the District of Columbia and the Virgin Islands. This case involves a challenge to a key section of the Code which confers the right of sale and which is substantially exact in all of the adopting jurisdictions. Petitioners contend that the basis of that challenge is without foundation because the civil rights laws were not intended to apply to the right of foreclosure sale.

The application of the public function theory to find state action in the private acts of a warehouse company, in a case devoid of racial overtones, requires a strong showing of state involvement, in light of the Amendment's and §1983's purpose, and the Supreme Court's requirement of "significant" state

11. Ch. 25 (1909) N.Y. Laws.

12. Ch. 553, §§7-210, 10-102 and repealer schedule annexed (1962) N.Y. Laws 2580.

involvement to overcome this limitation. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972). This burden of proof cannot be met, as a matter of constitutional law, by characterizing the private acts as the performance of a function of sovereignty delegated to the warehouseman by a statute permitting, but not requiring, its performance.

The fact that the warehouseman did not have this right of sale at common law does not lend any additional weight to support a finding of state action.

II. Even if the delegation of a function of sovereignty to private hands were sufficient to fairly treat the private party's actions as those of the state, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1973), such a function does not exist in the case of the warehouseman's lien foreclosure sale conducted pursuant to New York Uniform Commercial Code §7-210.

The majority of the Second Circuit predicates its characterization of the warehouseman's right of sale as a function of sovereignty upon finding that this is an "extraordinary" and a "drastic" remedy. The warehouseman's right of sale is far from extraordinary, other creditors having a right of sale, some even at common law. In comparison to these statutory rights, the warehouseman's statute is far less drastic, being so hemmed in by notice and publication requirements as to support the argument that it discourages, rather than encourages, sales. *Reitman v. Mulky*, 387 U.S. 369 (1967); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 212 (1970). Its rationale thus lacking any valid basis in fact, the Second Circuit's association of the warehouseman's lien sale with a function of sovereignty is erroneous.

It is incorrect, in the abstract, to define the dispute-resolving nature of the lien sale as a function of sovereignty, as the Second Circuit did. The Second Circuit's reliance upon *Boddie v. Connecticut*, 401 U.S. 371(1971), is misplaced, for that

case only classifies as a sovereign function the resolution of disputes which the state exclusively has resolved, such as dissolution of marriage. In contrast, commercial arbitration and other forms of private resolution of creditor-debtor disputes are traditional. Their resolution is not a sovereign function, in terms of *Boddie*, a fact which the nonconsensual nature of their resolution in certain instances cannot alter.

ARGUMENT

I.

THE STATE'S DELEGATION OF A GOVERNMENTAL POWER OF SOVEREIGNTY TO A PRIVATE PARTY DOES NOT, *IPSO FACTO*, TRANSMUTE THE PRIVATE PARTY'S ACTS INTO STATE ACTION.

A. The doctrine of state action, when viewed in the light of the historical purpose of the Fourteenth Amendment and 42 U.S.C. §1983, shows that the "public function" character of essentially private acts, in a nonracial setting, is insufficient to invoke the protection of constitutional guarantees.

The majority panel of the Court of Appeals found that the Fourteenth Amendment, which prohibits the State of New York from depriving individuals of their property without due process of law, and 42 U.S.C. §1983,[13] providing civil redress for such deprivation, apply to privately undertaken storage activities of a manifestly private and owner-operated warehouse company in Mount Vernon, New York and its president, individually. The majority reached its finding of state action despite the threshold command of the Fourteenth Amendment that:

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13. The "under color of" requirement for recovery under 42 U.S.C. §1983 requires that the deprivation result from state action. *United States v. Price*, 383 U.S. 787, 794 n.1 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-152 and n.7 (1970).

> "It is state action . . . that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

Civil Rights Cases, 109 U.S. 3, 11 (1883); *see also, Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The Supreme Court in *Shelley* was explicit that the bedrock principle of the Fourteenth Amendment's nonapplication to private conduct is not affected by the conduct's wrongfulness or hurtfulness:

> "That (the Fourteenth) amendment erects no shield against merely private conduct, however discriminatory or wrongful."

In hurdling the threshold "state action" barrier, the majority below gave no consideration to the history and original purpose of these two cornerstones of the civil rights laws. This was in error for three reasons:

First: Statutory construction normally includes consideration of the enactment's purpose as revealed in its legislative history. Courts are especially enjoined to engage in such a cautious "sifting facts and weighing circumstances" analysis when the preliminary "state action" question of the civil rights laws' applicability is involved. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).[14]

Second: The legislative history of the Fourteenth Amendment and §1983 is of particular importance to this case for it serves to explain lower courts' and the Supreme Court's

14. In *Burton,* Mr. Justice Clark, writing for the Court, assured those opposing the Fourteenth Amendment's application to that case, prophesizing its "nigh universal application," that the Court's finding of state action was limited to the facts of that case, since the Fourteenth Amendment is "so peculiarly dependent for its invocation upon appropriate facts," *Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 725-26.

doctrinal development of the "public function" theory upon which the majority of the Second Circuit relies.

Third: The legislative intent together with the other facts and circumstances of this case compel the conclusion that the Second Circuit erred in relying upon the public function theory as determinative of state action; further, that a warehouseman's lien foreclosure sale pursuant to N.Y.U.C.C. §7-210 is not "state action" within the meaning of the Fourteenth Amendment and 42 U.S.C. §1983.

1. Legislative History of Civil Rights Laws

The Fourteenth Amendment was the second in a succession of three Post-Civil War Reconstruction-era amendments to the Constitution enacted between 1865 and 1869. The Fourteenth Amendment was enacted in the Civil Rights Act of 1866 and ratified in 1868. Its purpose was to eradicate race discrimination and to guarantee the privileges and immunities of United States citizenship to all citizens. *Oregon v. Mitchell,* 400 U.S. 112, 151-200 (1970) (Harlan, J., concurring and dissenting).

In 1871, the Congress, exercising its legislative powers under the enabling clause of the Fourteenth Amendment, enacted the "anti-Ku Klux Klan Act of 1871." Section 1 provided for civil redress of deprivations of constitutional rights, privileges and immunities and is now embodied in 42 U.S.C. §1983, the statute upon which respondents base their lawsuit. The paramount legislative purpose of this act was to stem the tide of violent political repression and to implement the Fourteenth Amendment's guaranty of equal protection of the laws. *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 188 at 203-206 (Brennan, J., concurring and dissenting); *Collins v. Hardyman,* 341 U.S. 651, 656-57 (1951).

Equal in significance to the intent of the Fourteenth Amendment and §1983 is recognizing what their enactment was not intended to achieve. The debate in the 39th and 42nd Congresses was primarily concerned with Reconstruction issues and not with unforged *in rem* rights of debtors against creditors' *ex parte* pre-judgment remedies.[15] Detainer and other creditor security devices existing at common law included the lien of the innkeeper, warehouseman, common carrier, artisan and factor, title retention by chattel mortgagee and by vendor under conditional sale; field warehousing; the ancient pledge. 1 G. Gilmore, *Security Interests in Personal Property* §§3.2, 3.5, 5.2, 4.1 and 4.2 (1965); R. Brown, *The Law of Personal Property* §§10.7, 13.1, 13.2, 15.1, 17.1 (3d Ed. 1975); *Davis v. Richmond,* 512 F.2d 201 (1st Cir. 1975) (innkeeper's lien); *Knapp, Stout & Co. v. McCaffrey,* 177 U.S. 638, 644-45 (1900) (carrier's lien); *Markham v. Jandan,* 41 N.Y. 1 (1869) (pledge of stock certificates).

The default remedy of extrajudicial sale was also available to certain creditors: the factor, the conditional sale vendor, the chattel mortgagee under strict foreclosure and the pledgee under a simple pledge. 1 G. Gilmore, *supra,* §§3.2 at 67-68, 4.2 at 87-88 and n.2; R. Brown, *supra,* §§10.7 at 247-48, 13.1 at 392-93; ALI, Restatement of Security §§48(a), 72(2) (1941).

The legislative codification and extension of common law rights of sale to further classes of creditors which occurred in New York was representative of legislative developments in the other states. 2 G. Gilmore, *supra,* §33.2 at 873-74, §44.6 at 1238; Brief *amicus curiae* of Permanent Editorial Board of Uniform Commercial Code, *Adams v. Southern California First Nat'l Bank,* 492 F.2d 324 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974) at App. B., pp. 1-4. *See also,* in regard to New York

15. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, decided in 1969 as the first of four procedural due process cases decided in an economic context, the Supreme Court struck down *ex parte* prejudgment attachment of wages for lack of notice and prior opportunity to be heard.

statutory developments, Ch. 539 (1879) N.Y. Laws (conferring right of sale of guest's property to innkeepers). The members of the 39th and 42nd Congresses were undoubtedly acquainted with these creditor security and foreclosure devices and had no intention of reaching out through the due process clause and §1983 to eliminate them. *Anastasia v. Cosmopolitan Nat'l Bank,* 527 F.2d 150, 156 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976); *Gibbs v. Titelman,* 502 F.2d 1107, 1114 (2d Cir. 1974); *see gen.,* W. Burke and D. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (two parts), 46 S. Cal. L. Rev. 1002 (1972-1973), 47 S. Cal. L. Rev. 1 (1973-1974).

The fact that these remedies were of the "self help" variety is a further circumstance bearing upon congressional intent and its role in the proper resolution of the state action issue. If state action is found to exist in a warehouseman's lien sale, a greater violence would be done to legislative intent than striking down as unconstitutional a creditor remedy not intended to be outlawed. Being aware that these remedies were legitimized by the common law of the states' courts and, increasingly, by the legislatures of the several states, and being aware of the arguments about states' rights to govern matters which the Constitution left to traditional state control,[16] it is hardly conceivable that the civil rights enactments' supporters intended to overrule the states' widening authorization of private creditor remedies. Their intentions in enacting the Fourteenth Amendment and §1983 would be doubly thwarted in a finding of state action herein, removing the barrier against congressional

16. For example, Rep. Hoar, in support of the Ku Klux Klan bill, stated:

> "... particular class of persons are denied their civil rights ... frequently and as a rule in any State, we have a right to interfere simply to protect those rights, leaving the republican form of government, as far as it is enforced in regard to others, untouched where we can."

Cong. Globe, 42 Cong. 1st Sess. 320-21 (1871).

and Supreme Court regulation of interpersonal creditor-debtor relationships, which the 39th and 42nd Congresses thought were and would remain within the exclusive province of the states.

2. Development of Public Function Theory

The Circuit Courts, realizing the paramount purpose of 42 U.S.C. §1983 to eradicate invidious discrimination in all its manifestations, have advocated a dual test of state action. If racial discrimination is involved the test is less onerous than in a case devoid of racial overtones. *Fletcher v. Rhode Island Hospital Trust Nat'l Bank*, 496 F.2d 927, 931 (1st Cir. 1974); *Jackson v. Statler Foundation*, 496 F.2d 312, 328-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *James v. Pinnex*, 495 F.2d 206, 209 (5th Cir. 1974); *Turner v. Impala Motors*, 503 F.2d 607, 611 (6th Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 333 and n.24 (9th Cir. 1974), *cert. denied*, 119 U.S. 1006 (1974); *see also Oller v. Bank of America*, 341 F. Supp. 21, 23 (N.D. Cal. 1972).

The Supreme Court has shown a like awareness of the purpose of the civil rights laws. From *Nixon v. Condon*, 286 U.S. 73 (1932), to *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1961), to *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), the Supreme Court has hurdled the state action threshold to reach governmental action denying equal protection of the laws through race discrimination, notwithstanding that the discrimination was perpetrated by one group of individuals acting against another. In these cases the Supreme Court found that the state sought to circumvent the equal protection guaranty by placing traditionally governmental functions, such as conducting elections, *Nixon v. Condon, supra*, operating schools, *Griffin v. School Board, supra*, providing public recreational facilities, *Gilmore v. City of Montgomery, supra*, into the hands of private agencies who then claimed that their racially discriminatory policies were private actions beyond Fourteenth Amendment

purview. To defeat this subterfuge the Supreme Court developed the public function theory of state action, holding that a nominally private party; in performing a function traditionally the state's, becomes the instrumentality of the state and must be held accountable to Fourteenth Amendment guaranties, the same as though the state itself were acting.

> "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

Evans v. Newton, 382 U.S. 296, 299 (1966).

The companion cases of *Evans v. Newton*, 382 U.S. 296 (1966), and *Evans v. Abney*, 396 U.S. 435 (1970), demonstrate that the public function theory has its limitations, even in a race discrimination/equal protection context. In *Evans v. Newton*, state action was found in the transfer of custodianship of a segregated park to private trustees.[17] The private trustees were held to be performing a traditional public function.

In *Evans v. Abney*, no state action was found in the transfer of ownership of the park pursuant to Georgia trust statutes subsequent to the *Evans v. Newton* decision. The holding of *Evans v. Abney* was that state law recognizing private discriminatory intentions was not state action, since the state did not put its weight or authority behind the discrimination. *Id.*, 396 U.S. at 444.

Evans v. Abney was consistent with *Shelly v. Kraemer*, 334 U.S. 1, and with *Barrows v. Jackson*, 346 U.S. 249 (1953), finding state action where the state did put its weight and

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17. The City of Macon's ongoing entwinement in maintaining the park was an additional important indicium of state action in *Newton*.

prestige behind private discrimination, so that, in the language of *Barrows v. Jackson*, 346 U.S. at 254:

> ". . . . it becomes not respondent's voluntary choice but the State's choice that she observe her covenant (forbidding use or occupancy of residential property by Negroes) or suffer damages."

Cf. Reitman v. Mulky, 387 U.S. 369 (1967).

Thus, "where the impetus for discrimination is private," that is, a private party was following its own decision to discriminate in alleged violation of equal protection rights, the bare fact of some form of state aid or regulation, or of state permission or delegation of functions normally performed by government, was not enough to constitute state action, even in the context of race discrimination. "Significant", "affirmative" state involvement, the state placing its power and prestige behind the challenged activity, all but ordering it, was required. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-173 (1972); *Reitman v. Mulky, supra*, 387 U.S. at 375; *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

Outside the context of racial discrimination, the Supreme Court has been less willing to find state action in challenged activities, on a public function theory, even when the constitutional rights sought to be vindicated were sensitive First Amendment rights of speech, press and religion. *Compare Marsh v. Alabama*, 327 U.S. 501 (1946), *with Hudgens v. NLRB*, 424 U.S. 507 (1967); *cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 116 (1973) (finding no state action by governmentally-licensed radio broadcaster, a "public trustee" performing "statutory duties") (plurality opinion). Given the historical purposes and intentions of the Fourteenth Amendment and its legislative progeny, this course of development of the "public function" state action doctrine is sound.

J. Jackson v. Metropolitan Edison Company

The Court has not decided the state action issue on the basis of delegation to a private party of a function traditionally associated with sovereignty, in the abstract, devoid of other relevant indicia of state involvement. The Court was not confronted with this issue in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the most recent state action case closest in point to the instant case, because the Court held that such a public function was not involved and because there were numerous indicia of state involvement of the type relied upon by the lower courts: Metropolitan Edison's virtual monopoly economic status; its receipt of substantial benefits from the state; its extensive regulation by the state. Despite these traditional state action indicia, the Court held that the State of Pennsylvania was not significantly involved in Metropolitan Edison's utility cut-off procedures so as to require imposition of a pretermination notice and hearing under due process.

The *Jackson* decision shows that the type of constitutionally-protected right being asserted in a §1983 action has a different weight depending on whether or not it involves racial discrimination. *Adickes v. S. H. Kress & Co., supra*, 398 U.S. at 188, 190-191 (Brennan, J.); Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974).

The public function theory in the abstract is a poor test, standing by itself. As stated by Mr. Justice Brennan, dissenting in *C.B.S., Inc. v. Democratic Nat'l Committee, supra*, 412 U.S. at 170, 173, quoting *Reitman v. Mulky, supra*, 387 U.S. at 378:

> "(T)his Court has never attempted the impossible task of formulating an infallible test for determining in all instances whether particular conduct must be deemed private or governmental."

Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment 'State Action' Requirement*, 1976 Sup. Ct. Rev. 221 (1976).

B. In the absence of any other relevant indicia of state action in a warehouseman's lien foreclosure sale, the mere delegation of a sovereign function is insufficient to constitute state action in a case not involving racial discrimination.

1. The statutory origin of the warehouseman's right of sale is an immaterial factor.

The instant case presents none of the indicia of state action present and found insufficient in *Jackson*. Petitioner FLAGG BROTHERS is not a monopoly utility. It receives no more state benefits than other private companies. Its storage activities are not regulated by the state. Thus, a finding of no state action in *Jackson* compels a like finding here, on *a fortiori* grounds. The Second Circuit finding of a delegation of sovereign function standing alone, as it does in the case at bar, is insufficient. Assuming *arguendo* that such a delegation exists, the facts of this case, in which a private entrepreneur has made a privately-motivated business judgment to engage in the challenged function, without participation of any state official, and with no vestige of racial discrimination involved, compel the conclusion that the mere statutory delegation of a function of sovereignty is not state action.

The Second Circuit coupled the statutory delegation of a sovereign function with the corresponding expansion of common law default remedies as the basis of its decision. The one is the reiteration of the other. The second criterion, therefore, adds nothing to the analysis. In fact, giving consideration to the common law versus statutory source of a sales creditor's remedy can lead to the anomalous result that the same remedy might be state action in one state and not in another because of the accident of each state's different legislative

history. *Davis v. Richmond, supra*, 512 F.2d at 203; 2 Burke and Reber, *supra*, 47 S. Cal L. Rev. at 47.

This is precisely what has happened as a result of the Eighth Circuit's reliance upon historical origins in *Cox Bakeries of North Dakota, Inc. v. Timms Moving & Storage, Inc.*, 354 F.2d 356 (8th Cir., May 12, 1977). In North Dakota, under the *Timms* decision, the warehouseman's exercise of his sales right, pursuant to a North Dakota statute worded exactly like N.Y. U.C.C. §7-210 (see Appendix B of petitioners' brief, *infra*), is state action because the lien foreclosure was traditionally the function of the sheriff, the Uniform Commercial Code conferring the right of sale not being enacted until 1965. In California, however, according to *Timms*, the lien sale is not a traditional public function and thus is not state action, the warehouseman there having had the right of sale since 1872, when California adopted its first lien sale statute. *Accord, Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976).

The focus of inquiry for state action purposes has always been upon the private party and its challenged activities. The question for resolution is whether the State of New York has so far insinuated itself into the warehouseman's lien foreclosure sale to fairly treat the sale as the action of the state itself, through the nexus of the State Legislature's delegation of the power of sale to the warehouseman. *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 551; *Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172. The remedies the warehouseman may have had 100 years ago at common law are irrelevant, having no bearing upon the essential question of the exercise of these remedies today.

The State of New York has played no active part in petitioners' sales activity. It has been held, in other due process contexts, that where the state is not itself actively engaged in the conduct complained of, its sole involvement being limited to promulgating or delegating to the private party the power to

carry out the complained of activity, the state has not acted, in the literal sense, in deprivation of rights. *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 647 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 301 (2d Cir. 1971) (". . . . the Government did not itself increase the rents but simply allowed the landlord to institute an increase (without affording opportunity for a prior hearing) . . . ."); *Weigand v. Afton View Apts.*, 473 F.2d 545 (8th Cir. 1973).

The Second Circuit's reliance upon the common law versus statutory origin of the sales right ignores *Ex Parte Virginia*, 100 U.S. 339, 347 (1879):

> "A state acts by its legislature, its executive, *or its judicial authorities.* It can act in no other way." (Emphasis added.)

It is submitted that conferral of a right by the Legislature is not state action anymore than a right established by the common law dispensed by the judiciary, a coordinate branch of state government. In light of the Supreme Court decisions finding state action in judicial rulings (*Shelley v. Kraemer, supra; Barrows v. Jackson, supra*), as well as in legislative enactments (*Nixon v. Condon, supra*), and executive functions such as conducting a referendum election (*Reitman v. Mulkey, supra*), it should not make a difference that a New York warehouseman's sale remedy was conferred by legislative enactment rather than resulting from common law.

2. Outcome of present case.

This is not a case of subterfuge to circumvent the equal protection guaranty, for which the public function theory was originally designed and intended. There is no proof of any evil state purpose in the New York Legislature's investing the warehouseman with the right of "self-help" that warrants

extending the public function doctrine of state action beyond its present confines. Furthermore, to apply the public function fiction in the abstract, based solely upon a theoretical characterization of a legislative enactment 98 years old, lacking any other basis in relevant facts or circumstances, would represent a radical departure from the sifting and weighing mandated by *Burton* and subsequent Supreme Court state action cases, as well as from these cases' substantive requirement of "significant" and "affirmative" state involvement.

This case is controlled by the Supreme Court's consistent holding that where the state merely permits a party to act according to his own dictates, not directly participating in the act itself, nor encouraging the party to act by some form of state assistance or other positive state encouragement, amounting to a direction that the act be undertaken, *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 354-55; *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949 (10th Cir. 1975), the state realistically cannot be said to be "significantly" involved in the challenged activity. The state cannot be deemed a "willful participant in joint activity" with the private party, *United States v. Price,* 383 U.S. 787, 794 (1967). Absent such significant, affirmative state involvement, the mere conferral of a governmental function is not state action.

Court-developed legal doctrines should be used to implement, not to frustrate, congressional intent. The Second Circuit's bare reliance upon a public function delegation theory of state action, in addition to its inherent flaws, better awaits another case involving racial discrimination, the main evil that Congress sought to eradicate by its civil rights legislation. The instant case simply does not present "appropriate facts" to warrant such an unprecedented expansion of the state action doctrine. *Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 726.

II.

THE WAREHOUSEMAN'S LIEN FORECLOSURE SALE PURSUANT TO N.Y.U.C.C. §7-210 IS NOT A FUNCTION TRADITIONALLY ASSOCIATED WITH SOVEREIGNTY.

A. The warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not extraordinary.

In *Jackson v. Metropolitan Edison Company, supra,* the Supreme Court said at 419 U.S. 352-353:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the state which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

The majority of the Second Circuit found such a power in the petitioner warehouseman's lien foreclosure sales pursuant to N.Y.U.C.C. §7-210. *Brooks v. Flagg Brothers, Inc., supra* (A174a). This was error.

The rationale behind the Second Circuit's use of the *Jackson* formula is that the sale represents an "extraordinary remedy" which "drastically" alters the warehouseman's nonstatutory powers(A173a, 176a).

A creditor's right of summary sale of collateral to satisfy delinquent charges, without court order, existed at common law, for the benefit of a number of creditors. See Brief, Point I, *supra.* Today, at least 10 types of creditors, in addition to the petitioner warehouseman, are given by statute a right of summary sale to collect delinquent charges.[18]

18 Innkeepers, N.Y. Gen. L. §200, *Blye v. Globe-Wernike Realty Co.,* 33 N.Y.2d 15, —N.E.2d—, 347 N.Y.S.2d 170 (1973); common carriers, (Cont'd)

Further comparison of these parallel sales statutes shows the warehouseman's right of sale, contrary to the Second Circuit's characterizations, to be a fairly unremarkable product of 19th and 20th century legislation in the creditor-debtor field of commercial law. *Davis v. Richmond, supra.*

The differences indicate that the challenged warehouseman's remedy is less drastic than other rights of sale. N.Y.U.C.C. §7-210 does not provide for debtor's liability for deficient sales proceeds. *Contrast* §7-210 *with* U.C.C. §9-504(2). In contrast to §7-210's permissiveness in making a sale optional, an Article 9 secured creditor, including a creditor under retail installment sales of consumer goods, N.Y.U.C.C. §§9-102, 9-203(2), must sell if the debtor has paid sixty per cent of the cash price or sixty per cent of the loan. U.C.C. §9-505(1).

Section 7-210 is extraordinary, if at all, to the extent that it surrounds a warehouseman' sale with meticulous procedures and strict liability. U.C.C. §7-210(2), Comment 1; *contrast* N.Y.U.C.C. §9-504(3). The failure to comply with these provisions mulcts the warehouseman in damages. N.Y.U.C.C. §7-210, Subsec. (9).

A warehouseman's freedom to act is not circumscribed in any way by the optional nature of U.C.C. §7-210. *Lombard v. Louisiana,* 373 U.S. 267 (1962); *Barrows v. Jackson, supra.* The warehouseman can either sue on the debt, U.C.C. §7-210(7), or conduct a lien sale. The Code does not command his course of action. *Peterson v. City of Greenville, supra.* It is a consumer-

(Cont'd)
N.Y.U.C.C. §7-308(1); artisans, Lien L. §§180, 200; factors, U.C.C. §§9-102(2), 9-504(1), 10-102 and repealer schedule annexed, conditional sale vendors, including vendors under retail installment sales, U.C.C. §§9-102(2), 9-203(2), 9-504(1), Personal Prop. L. §§301 *et seq.*, 401 *et seq.;* chattel mortgagee, U.C.C. §9-102(2), 9-504(1); pawnbroker, Gen. Bus. L. §48; banking organizations maintaining safe deposits as bailee for storage, Banking L. §336; lienors under garagekeeper's lien, jewelry and watch repairman's lien, Lien L. §§183-184, 200.

oriented statute beset with pitfalls for the warehouseman who elects to use it. An argument that the statute discourages use of the right of sale is at least as strong as the argument that it encourages use of the right of sale, *Reitman v. Mulky, supra,* for it is small "aid, comfort or incentive" to the warehouseman to know, as stated in *Hackett v. Nelson Express & Storage Co.,* 162 Misc. 444, 294 N.Y.S. 905, 909 (Sup. Ct. 1937), that the warehouseman lien sale statute "seeks to protect the person storing the goods." *Adickes v. S. H. Kress & Co., supra,* 398 U.S. at 212 (Brennan, J., concurring and dissenting).

If the Second Circuit's "drastic power" rationale is adopted, it would mean subjecting to due process requirements, not just the warehouseman's lien sale, but all of the "self-help" practices currently used in New York, none of which are distinguishable as requiring debtor consent for their validity. *See, e.g.,* N.Y.U.C.C. §9-501, Subsec. (1).

B. The warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not an exercise of a function of sovereignty.

The Second Circuit's characterization of the dispute-resolving nature of a warehouseman's lien sale is based upon an erroneous and nonsupportive rationale. In characterizing "binding conflict resolution" as a function of sovereignty, the Second Circuit relies upon the dissenting opinions in two Second Circuit cases. *Shirley v. State Nat'l Bank,* 493 F.2d 739, 747, *cert. denied,* 419 U.S. 1009 (1974) (Kaufman, C.J., dissenting); *Bond v. Dentzer,* 494 F.2d 302, 312, *cert. denied,* 419 U.S. 837 (1974) (Kaufman, C.J., dissenting). *Brooks v. Flagg Bros., Inc., supra* (A174a).

The dissenting opinion relied upon a passage taken from Mr. Justice Harlan's opinion for the Court in *Boddie v. Connecticut,* 401 U.S. 371, 374-375 (1971), holding that the State of Connecticut's denial of access to the courts to initiate divorce proceedings, for inability to pay the filing fees, violated

the indigent plaintiff's due process rights. There are no alternatives to court action, to dissolve a marriage in American society; the state exercises monopoly power over marriage's dissolution. *Id.,* 401 U.S. at 374-75. Conversely, if the state does not monopolize the resolution of a particular type of dispute, then the power it exercises cannot be characterized as a function of sovereignty, since other institutions or individuals in addition to the state resolve the same type of dispute. *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 352-353.

It is not traditional for the state alone to resolve commercial disputes. E. Johnson, V. Kantor and E. Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases, at 40 (National Center for State Courts 1977). Private ordering and resolution of disputes over a creditor's charges, as noted by Mr. Justice Harlan and by Burke and Reber, would be lost if arbitration or other out-of-court dispute-resolving techniques are considered a delegated function of sovereignty and thus governmental action within constitutional purview. *Boddie v. Connecticut, supra,* 401 U.S. at 375-76; *Wahba v. New York University,* 492 F.2d 96, 102-103 (2d Cir. 1974); 2 Burke and Reber, *supra,* 47 S. Cal. L. Rev. at 42-43, 56; Johnson-Kantor-Schwartz, *supra,* at 1-7, 40.

The warehouseman's lien foreclosure sale is not a function of sovereignty, even though it is of a dispute-resolving nature, since it resolves commercial disputes which are not traditionally an exclusive state function. Judge Kaufman injects the non-consensual nature of "self-help" creditor remedies as an additional element of the dispute-resolving between creditor and debtor that, according to the Second Circuit below, constitutes a function of sovereignty. This attempt to confine the "binding conflict resolution" theory of state action to manageable limits, reserving a desirable sphere of private dispute-resolving, fails. Whether a party consents to it or not, the private resolution of a dispute remains private so long as it is conducted between private parties; to hold otherwise leads to anomalous and undesirable applications of the Constitution.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Dated: New York, New York
November 11, 1977

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, amend. XIV, §1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> **"Civil action for deprivation or rights**
>
> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appendix A

28 U.S.C. §1343:

"Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

N.Y.U.C.C. §7-210:

"Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If

Appendix A

the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien qn goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods

free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

APPENDIX B

TABLE OF JURISDICTIONS THAT HAVE ADOPTED UNIFORM COMMERCIAL CODE §7-210

Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Alabama	1965	Ala. U.C.C. §7-210	
Alaska	1962	A.S. §45.05.560	(1) (2)
Arizona	1967	A.R.S. §44-2915	
Arkansas	1961	Ark.Stats. §85-7-210	(1)
California	1963	U.C.C.A. §7210	(3)
Colorado	1965	C.R.S. 1963, §155-7-210	
Connecticut	1959	Gen.Stats. §42a-7-210	(4)
Delaware	1966	5A Del. Code §7-210	
District of Columbia	1963	D.C. Code §28:7-210	
Florida	1965	Fla.Stats. §677.7-210	
Georgia	1962	Ga. Code §109A-7-210	(1)
Hawaii	1965	Haw. U.C.C. §7-210	
Idaho	1967	Idaho U.C.C. §7-210	(5)
Illinois	1961	Ill.Rev.Stats.ch.26,§7-210	
Indiana	1963	Ind. Stats. §19-7-210	

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Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Iowa	1965	Iowa Code ch. 554, §7210	
Kansas	1965	K.S.A. §84-7-210	
Kentucky	1958	K.R.S. §355.7-210	
Maine	1963	Me. R.S. Title 11, §7-210	
Maryland	1963	95B Md. Code §7-210	
Massachusetts	1957	G.L. ch. 106, §7-210	(6)
Michigan	1962	C.L. §440.7210	
Minnesota	1965	Minn.Stats. §366.7-210	
Mississippi	1966	Miss.U.C.C. §7-210	
Missouri	1963	Mo. U.C.C. §7-210	
Montana	1963	R.C.M. §87A-7-210	
Nebraska	1963	Neb. U.C.C. §7-210	(1)
Nevada	1965	8 Nev. R.S. §7-210	
New Hampshire	1959	N.H.Rev.Stats. §382-A:7-210	
New Jersey	1961	N.J. Stats. §12A:7-210	(1)
New Mexico	1961	N.M.Stats. §50A-7-210	

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Jurisdiction	Year Enacted	Statutory Citation	Local Variations
New York	1962	N.Y. U.C.C. §7-210	
North Carolina	1965	G.S. §25-7-210	
North Dakota	1965	N.D.Cent.Code §41-07-16	
Ohio	1961	R.C. §1307.15	(1)
Oklahoma	1961	Okla. Stats. 12A §7-210	(1)
Oregon	1961	O.R.S. §77.2100	(1)
Pennsylvania	1953	12A P.S. §7-210	
Rhode Island	1960	R.I.G.L. §6A-7-210	(1)
South Carolina	1966	S.C. Code §10.7-210	
South Dakota	1966	S.D.C.L.1967, §§57-26-24-57-26-32	
Tennessee	1963	Tenn. Code §47-7-210	(7)
Texas	1965	Tex. U.C.C. §7-210	
Utah	1965	Utah Code §70A-7-210	
Vermont	1966	9A Vt. Stats. §7-210	
Virgin Islands	1965	11A V.I. Code §7-210	
Virginia	1964	Va. U.C.C. §7-210	

Appendix B

Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Washington	1965	R.C.W. 62A.7-210	
West Virginia	1963	W. Va. Code ch.46, §7-210	
Wisconsin	1963	Wis. Stats. §407.210	(8)
Wyoming	1961	Wyo. Stats. §34-7-210	(1)

(1) Subsection (2)(b) of this State's §7-210 does not permit mailing of notice by certified mail.

(2) Subsection (2)(f), A.S. §45.05.560 (Alaska), requires posting of advertisement in three conspicuous places.

(3) Subsection (2)(f), U.C.C.A. §7210 (California), adds requirement that a newspaper be one "in the judicial district" where the sale is to be held.

(4) Subsection (2)(b), Gen. Stats. §42a-7-210 (Connecticut), adds requirement that notice sent by certified mail be receipted for by the addressee.

(5) Subsection (1), Idaho, U.C.C. §7-210, substitutes "this" for "his" preceding the word sale in the fourth sentence.

(6) Subsection (1), G.L. ch. 106, §7-210 (Massachusetts), fourth sentence, starts out, "If the warehouseman in good faith for the purpose of avoiding or reducing loss and of effective realization either sells the goods," rather than "If the warehouseman either sells the goods. . . ."

Appendix B

(7) Subsection (2)(b), Tenn. Code §47-7-210, substitutes word "mail" for word "letter".

(8) Subsection (2)(f), Wis. Stats. §407.210, substitutes reference to general statutory provisions governing notices in place of the U.C.C. requirements as to permissible newspapers in which to place the advertisement and the number of times the advertisement must be published. The minimum 15-day waiting period between first publication and sale is omitted.

SOURCES: 1 Uniform Laws Ann., Uniform Commercial Code §§1-101 to 2-725 (1968) at XXXVII.

3 R.Anderson, Uniform Commercial Code §7-210:3 (2d Ed.1971) (pocket part Jan., 1977).

APPENDIX C

SESSION LAWS, CHAP. 336, PAGE 417

"AN ACT to enable storage warehousemen to collect their charges upon goods deposited with them by the sale thereof.

Passed May 19, 1879

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Every warehouse company, or person or persons, engaged in the warehouse business who shall have had in their possession any goods, wares, or merchandise by virtue of an agreement or warehouse receipt for the storage of the same on which or any part thereof there may be due two years' storage, may proceed to sell the same at public auction, and out of the proceeds may retain the charges for storage of said goods, wares, and merchandise, and any advances that may have been made thereon by him and the expense of advertising and sale thereof; but no such sale shall be made until after the giving of a printed or written notice of such sale, containing a description of the articles to be sold, together with the name of the person or persons storing the same, nor until six months after termination of the time for which such goods were received.

§2. The notice required by the last preceding section shall be served personally, at least four weeks before the time of such sale upon the party storing the goods, provided such service can be

made with reasonable diligence within the State of New York. If the party storing such goods cannot with reasonable diligence be found within the State of New York, then such notice shall be given by publication once in each week for six successive weeks, before the time of such sale in a newspaper published at or nearest the place, when such sale is to take place. In the event that the party storing such goods or merchandise shall have parted with the same, and the purchaser shall have notified the warehouseman with his address, such notice shall be given to such person in lieu of the person storing the goods.

§3. Such warehouse company, or person or persons, engaged in the warehouse business, shall make an entry in a book kept for that purpose of the balance or surplus of the proceeds of the sale, if any, and such balance or surplus shall be paid over to such person or persons entitled thereto within thirty days after such sale and after the expiration of said thirty days such balance or surplus shall be paid by such warehouse company, or person or persons, engaged in the warehouse business to the county treasurer; or if in the city of New York to the chamberlain of said city, for the use of the poor, unless called for or claimed by the rightful owner within five years after the receipt thereof, and shall at the same time file with said treasurer or chamberlain an affidavit in which shall be stated the name and place of residence, so far as the same are known, of the person whose goods or merchandise have been sold, the articles sold and the prices at which they were sold, the name and residence of

the auctioneer making the sale, together with a copy of the notice published and how served, whether by personal service or by mailing, and if not so served the reason therefor.

§4. This act shall take effect immediately."

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., ET AL.; LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK; AND AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, ET AL.,

Respondents.

BRIEF OF PETITIONERS AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 72-25, 77-37 and 77-42.

FLAGG BROTHERS, INC., ET AL.; LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK; AND AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, ET AL.,

Respondents.

BRIEF OF PETITIONERS AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 553 F. 2d 764 (2d Cir. 1977).

The opinion of the District Court is reported at 404 F. Supp. 1059 (S. D. N. Y. 1975). A prior opinion of the District Court granting motions to intervene is reported at 63 F. R. D. 409 (S. D. N. Y. 1974).

JURISDICTION.

The order of the Court of Appeals was entered on April 7, 1977. Pursuant to Rule 22, petitions for a writ of certiorari were filed within 90 days of that date by Flagg Brothers, Inc. *et al.*, in No. 77-25; Louis J. Lefkowitz, Attorney General of the State of New York in No. 77-37; and American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc. in No. 77-42. Certiorari was granted on October 3, 1977, and the cases were consolidated. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. Constitution, amend. XIV § 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983:

> "Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U. S. C. § 1343:

> "Civil Rights and Elective Franchise.
>
> The districts courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Uniform Commercial Code (New York):

> "§ 7—210. Enforcement of Warehouseman's Lien
>
> (1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
>
> (2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the liens was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

QUESTIONS PRESENTED.

1. Is "state action" present in the enforcement by a warehouseman of his lien for payment of storage charges as provided under Section 7-210 of the Uniform Commercial Code?

2. Does the lien enforcement procedure satisfy due process when applied by a commercial warehouse against the goods of a merchant stored in the ordinary course of his business?

STATEMENT OF THE CASE.

The constitutionality of Section 7-210 of the Uniform Commercial Code is the issue in this case. The case arises under the New York Statute containing these UCC provisions.

Since these provisions govern warehousing in 49 states and the District of Columbia, the American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc. (hereinafter termed AWA and IARW) have a vital interest in the case. Rather than repeat the Statement of Facts peculiar to the controversy between Respondents and Flagg Brothers, Inc., these Petitioners will adopt that set forth in the Brief of Petitioner Flagg Brothers, Inc.

In its original posture the complaint in this case sought a finding that both Section 7-209 and 7-210 were unconstitutional. (A. 7a.) Section 7-209 is the UCC provision which establishes that a warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for storage and specific related charges in relation to the goods.

The decision of the District Court found no state action as to either Section 7-209 or 7-210. In their Brief to the Second Circuit Court of Appeals the plaintiffs apparently abandoned their position that Section 7-209 involves state action. This alteration of position was recognized by the Court of Appeals, *Brooks* v. *Flagg*, 553 F. 2d 764, 769 (2d Cir. 1977.)

Petitioners AWA and IARW are vitally concerned with both the creation of the lien under Section 7-209 and its enforcement under Section 7-210. The reasons for that concern were set forth in the affidavits in opposition to summary judgment. (A. 119a, 123a.) A summary of these facts will assist in a full understanding of the issues as they relate to commerical warehousemen.

The Members of AWA and IARW operate public merchandise warehouses throughout the United States, including the State of New York. Merchandise warehouses provide storage and distribution services for industrial and commercial accounts.

AWA's 478 members, 18 of which are located in the State of New York, account for approximately 1,800,000,000 cubic feet

of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. (A. 124a.) IARW's 218 U. S. member companies, 27 of which are in New York State, account for about 567,000,000 cubic feet of public refrigerated warehouse space, or over 75% of the total in the United States. (A. 119a.)

AWA members typically store dry merchandise while IARW members provide refrigerated storage. The types of commodities handled range from consumer goods such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturer's parts, machinery, chemicals, etc. The typical refrigerated warehouse stores perishable foodstuffs but is also handling an increasing variety of commercial products which require refrigeration, such as chemicals and plastics. (A. 120a, 124a.)

Both the merchandise and refrigerated warehouses are essential parts of the nationwide distribution system of many companies. They receive goods from producers located throughout the country, or the world, and distribute such goods throughout the region surrounding the warehouse. (A. 120a, 125a.)

The services accorded to such goods include break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, coopering, sampling, weighing, loading and unloading of rail cars, and numerous other functions related to the storage and distribution of commercial goods. The refrigerated warehouseman provides freezing services as well as storage at a range of temperatures depending upon the nature of the product. (A. 120a.)

The merchandise warehouseman is typically a small, locally owned and managed company. Of the 1,677 general merchandise warehouses in the United States only 27 had 100 or more employees; only 200 had annual gross revenues of $500,000 or more; and 954 of them were located in areas with less than one million population. (A. 127a-128a.) Of the 749 refrigerated warehouses in the United States, only 142 had annual gross revenues of over $500,000; and only 182 were located in areas

of 1,000,000 or more inhabitants. Of the 89 refrigerated warehouses in New York State, 22 were in New York City, 6 in Buffalo and the remaining 61 were in the smaller communities of New York. (A. 121a.)

These small, locally owned merchandise warehouses deal with large multistate and multinational corporations. They also deal with small, unknown companies located throughout the country and the world.

Merchandise warehouses perform a vital commercial function in facilitating the movement of goods in the stream of commerce. Goods from all over the country, as well as imported goods, are consigned to a local warehouse. The warehouse receives the goods and performs the various break bulk and other commercial services with respect to the goods, and distributes them in customized orders to the various customers of the bailor. Its function is to facilitate the flow of goods from producer to user. Distribution costs are reduced and operating efficiencies are attained. (A. 122a, 127a.)

In providing these vital commercial services the local warehouseman relies upon the existence of the warehouseman's lien. It permits him to assume the risk of receiving goods; storing the goods; performing the necessary break-bulk, packaging and related functions; and shipping the goods. Often he will pay the incoming and outgoing freight charges to facilitate the movement of the goods. (A. 121a-122a, 129a.)

All of these services and expenditures are done in reliance upon the lien. The lien applies to all goods of the bailor in possession of the warehouseman, allowing the release of goods but retaining the security of the lien upon other goods of this bailor in storage. A. 122a, 129a.)

The existence of the lien allows the free flow of goods through the warehouse without the necessity of prepayment procedures or similar strictures which would preclude the movement of goods until charges have been satisfied. The lien allows the local,

generally small warehouseman to deal in the goods of companies located throughout the country and the world without extensive prearrangement for security, credit, prepayment and similar protections. The lien facilitates the movement of goods through the stream of commerce.

Small companies and new companies must minimize their outlay of capital in the distribution and marketing of their goods. At the same time they must expand and open up new markets and sell into new parts of the country. The security of the lien facilitates the warehouseman's handling of the goods of such companies without the prepayment of all contemplated charges. (A. 120a-121a, 128a-129a.)

The sale of goods pursuant to the lien is also a commercial necessity. Space is the foundation of the warehouseman's operation. The space occupied by goods of a defaulting bailor must be expeditiously cleared. It is of little benefit to the warehouseman to assert that if delays occur because of the need to sue on the debt and foreclose on a judgment, that the additional storage charges during the delay might be part of the compensation.

The merchandise warehouse is designed to move goods and earn revenues in handling goods and providing the various break-bulk, packaging and related functions. The opportunities to earn such revenues are lost when space is tied up in the nonproductive storage of the goods of a defaulting bailor.

Further, the value of commercial goods often requires that they be expeditiously sold. Perishable goods are a prime example. If not quickly sold their value is diminished or even lost. Seasonal goods are another example, as are commodities with widely fluctuating market prices. (A. 122a.)

The Court of Appeals recognized that Petitioners AWA and IARW had raised a serious argument that the summary sale provisions, in the context of a merchant storing his goods in the course of his business, may be constitutionally unobjectionable. The Court then suggests that since only Section 7-210(2)

is involved in the instant sale of household goods, the commercial warehousemen can avoid possible adverse determination of the constitutionality of Section 7-210(1) by excluding themselves from the defendant class.

However, Section 7-210(8) of the Uniform Commercial Code allows a warehouseman who has a lien upon goods stored by a merchant in the course of his business to enforce it in accordance with either Section 7-210(1), at private sale, or Section 7-210(2), at public sale.

Thus, the decision of the Circuit Court that Section 7-210(2) involves state action and that the constitutionality of that provision can be separately decided from Section 7-210(1) does not resolve the problem for the commercial warehouseman. This approach ignores the fact that the merchandise or commercial warehouseman relies upon both provisions of the statute. Public sale of a merchants goods by a commercial warehouse is equally as important, if not actually more important than the right to conduct a private sale.

Consequently, it is imperative that this Court, assuming it should find that "state action" exists, address the issue of whether the enforcement of the lien against the goods of a merchant stored in the course of his business is constitutional, recognizing the nature of the parties and the type of goods involved.

SUMMARY OF ARGUMENT.

State action should not be determined on the basis of whether the lien enforcement provisions existed at common law. Instead the history and purposes of the provision must be examined to determine if the state is significantly involved. Similarly, the mere fact that a sheriff conducts an auction to enforce a judgment does not automatically convert the auction provisions of the warehouseman's lien statute into state action. When appropriate consideration is given to the background and purposes of the

statute, as well as the minimal state involvement, it is clear that state action is not involved.

If, however, state action is found to exist, the Court should further assess the purposes and history of the warehouseman's lien provisions as they relate to the bailment by a merchant of his goods in the ordinary course of his business. The UCC provisions satisfy due process when considered in light of the parties involved in such a commercial transaction, the goods being stored, the need for a summary procedure to dispose of such goods, and the reasonable protections for the interests of the merchant.

ARGUMENT.

State Action Is Not Involved in the Enforcement of a Warehouseman's Lien.

The Court of Appeals found state action by focusing too narrowly upon the absence of common law decisions allowing a warehouseman to sell stored goods to enforce his lien. The lack of a common law origin for the statutory right is of small worth in deciding whether state action is involved in the disputed activity. The extent of state involvement must turn upon an analysis of the rights and interests involved, not any mechanical test of whether the rule had evolved under the common law or came from the legislative process.

As noted by the dissent of Judge Holden, the New York legislature enacted provisions allowing a warehouseman to sell bailed goods in 1879. Ch. 336 (1879) N. Y. Laws 417. *Brooks* v. *Flagg, supra* at p. 775. The statute is almost 100 years old. A review of legislation in other states indicates that similar provisions were being enacted at about the same time.

In California the authority of a warehouseman to sell bailed goods was enacted in 1851. 1851 Stats. c. 12, p. 170. *Melara* v. *Kennedy*, 541 F. 2d 802, 805 (9th Cir. 1976). That statute allowed sale after the bailor was three months in arrears.

Other states were enacting similar statutes during the late 1800's. Colorado had such a law in 1874, L. 1874, pp. 305, 306 Sec. 5. It allowed sale of the stored goods at auction, after giving notice to the bailor, if charges were not paid within 90 days. In Oregon, such goods could be sold at auction if three months unpaid storage charges had accrued. Hills Annot. Laws of Oregon, 1892, Sec. 3685. In Missouri, the sale could be made if charges remained unpaid for 60 days. Laws 1895, pp. 282-283.

By 1906, at least 25 states had statutes allowing a warehouseman to sell stored goods to realize upon his lien for storage charges.* The laws generally required a specified period of time to elapse without payment of storage charges prior to a sale of the goods. The period was from 2 to 12 months. The sale was to be by public auction conducted by the warehouseman, although several of the statutes required a justice of the peace or sheriff to inventory the goods and conduct the sale.

The laws provided notice provisions. Usually there were in the form of written notice to the bailor as well as newspaper publication or posting of a public notice of the proposed sale.

In some instances perishable products were accorded different provisions. They could be sold sooner than the prescribed waiting period and the notice provisions were less strict.

* Alabama—1896 Code, Sec. 4225-4228; Arkansas—Act XXX, Laws, 1895; California—1851 Stats. c. 12, p. 170; Colorado—L. 1874, pp. 305, 306 Sec. 5; Connecticut—Laws 1895, Ch. 204, Sec. 1 and 2; Florida—Laws 1873, Ch. 1943; Georgia—Ga. Code Supp. 1901, Sec. 6585; Iowa—Sec. 26, Gen'l. Stat., Ch. 107 of Laws 1873; Kentucky—Ky. Stat. 1899, Sec. 4778; Maine—Laws 1897, Ch. 304, p. 339; Massachusetts—Laws 1887, Ch. 227, Sec. 1; Michigan—Consol. Laws 1887, Ch. 127 Sec. 14; Minnesota—G. S. 1866, Ch. 19, Sec. 17-21; Missouri—Laws 1895, p. 282; Nebraska—Laws 1901, Sec. 5346; New Jersey—P. L. 1886, p. 181, Sec. 2; North Carolina—Laws 1901, p. 908 et seq.; North Dakota—Revised Code 1895, Sec. 4195-4197; Oregon—Hills Annot. Laws of Oregon 1892, Sec. 3685; Rhode Island—General Laws 1896, Ch. 206, Sec. 25; South Carolina—Code 1902, Sec. 1725-1728; Vermont—Stat. 1894, Sec. 4859 et seq.; Washington—Codes and Stat. of Washington (Ballinger), 1897, Sec. 5963-5966; Wisconsin—Rev. Stat. 1898, Sec. 1638-1646; and Wyoming—Rev. Stat. 1899—Sec. 2847-2850.

In 1906, the National Conference of Commissioners on Uniform State Laws adopted the draft of An Act To Make Uniform the Law of Warehouse Receipts.

The principal objective of the Uniform Law was to achieve uniformity in the warehouse receipt provisions which were used as collateral in commercial financing. As was stated in *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Company*, 239 U. S. 520, 529 (1915):

> The cardinal principal of the Act—which has been adopted in many States—is to give effect, within the limits stated, to the mercantile view of documents of title.

The warehouseman's lien and his right to enforce it by notice and sale of the stored goods were included within the proposed Uniform Law.* Clearly, such lien and sale provisions were appro-

* Uniform Warehouse Receipts Act §§ 33-34 (1906):

SEC. 33. SATISFACTION OF LIEN BY SALE. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain:

(*a*) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(*b*) A brief description of the goods against which the lien exists,

(*c*) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(*d*) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the ware-

(Footnote continued on next page.)

priate to protect the interests of the commercial warehouseman who was issuing the warehouse receipts used as documents of title.

By 1920 a total of 41 states had adopted the Uniform Warehouse Receipts Act, including New York in 1907. Laws 1907

(Footnote continued from preceding page.)
houseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired; or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit.

SEC. 34. PERISHABLE AND HAZARDOUS GOODS. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without

(Footnote continued on next page)

Ch. 732. Handbook of the National Conference of Commissioners on Uniform State Laws, 1920, pages 25 and 32.

The present provisions governing warehouse receipts and liens were included in the revision of commercial laws promulgated as the UCC. These UCC warehouse provisions are in effect in 49 states and the District of Columbia.

This brief summary of the antecedents of the UCC is designed to show that the New York legislative experience is typical of that involving the development of the warehouseman's lien provisions throughout the country. The majority decision in the Court of Appeals did not give appropriate weight to this legislative background.

The history of this provision shows the development of a reasonable and necessary commercial statute. It is designed to order the relations among the parties to the warehouse arrangement, giving appropriate weight to the interests of all concerned. The involvement of the state, other than in enacting the statute, is nil.

The danger of analyzing whether state action exists by reference to common law rights is further illustrated in *Cox Bakeries of N. D.* v. *Timm Moving & Storage*, 554 F. 2d 356, 358 (8th Cir. 1977). That decision distinguished *Melara* v. *Kennedy*, *supra*, by noting that California had not traditionally required judicial foreclosure of a warehouseman's lien, and the California

(Footnote continued from preceding page.)
advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof.

The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section.

SEC. 35. OTHER METHODS OF ENFORCING LIENS. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property.

statutes had included the right of private sale as far back as 1872 (sic).

North Dakota law, which was involved in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* was said to require proving the lien and the amount of storage charges in a judicial proceeding and foreclosure of any judgment by the sheriff under court supervision, at least until 1967 when the UCC provisions were enacted.*

The decision in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* with respect to the state action issue is not persuasive. It is too narrow a view for a statute that has nationwide applicability. In light of the history and purposes of the warehousemen's statute, this Court should not consider the rationale in *Cox* persuasive as to state action. To do so would cause the same UCC provision to be state action in one state but not in another.

When the statutory provisions are viewed in light of their background, it is readily apparent that the state involvement is minimal. It is also, especially as regards the commercial warehouseman, a reasonable involvement for an appropriate commercial purpose. The purposes of the statute should not be ignored in deciding whether the amount of state involvement raises the disputed private conduct to the level of "state action."

The fact that the sale provisions did not exist at common law is not determinative of the state action question. Similarly the fact that sheriffs normally execute upon judgments by public auction does not convert the auction of warehoused goods into a state function.

In exercising his duties, a sheriff is given a roving commission to discover and sell the assets of the judgment debtor. A warehouseman's lien sale is strictly limited to goods stored and is circumscribed with protections as to the notice to be given the bailor, the place and manner of sale and, in the case of a commercial warehouse, the quantity of goods which can be sold.

* There is some question concerning this statement since the Uniform Warehouse Receipts Act was adopted in North Dakota in 1917, Laws 1917, Ch. 250, N.D. Century Code 60-08-32, and a predecessor statute gave warehousemen the right to sell stored goods after a six month default. Revised Code, N.D., 1895, Sections 4195-4197.

There is a clear distinction between a sheriffs power and that of a warehouseman. See: *James* v. *Pinnix,* 495 F. 2d 206 (5th Cir. 1974) upholding the self-help repossession and sale provisions of Section 9-503 of the UCC, and to the same effect, *Adams* v. *Southern California First National Bank,* 492 F. 2d 324 (9th Cir. 1973).

The authority of a warehouseman to exercise upon the stored goods is not the exercise of a state function in the context of the history of the warehouse laws. The involvement is not sufficiently significant to sustain a decision that "state action" is involved. The Court of Appeals erred on this question and its decision should be reversed.

If the Court Determines That State Action Is Involved It Should Further Find That in the Merchant-Warehouseman Context the Statute Satisfies Due Process.

As the majority opinion of the Court of Appeals recognized the commercial warehouseman stands on a different footing than that of the bailee of household goods. *Brooks* v. *Flagg Brothers, Inc., supra,* at page 774. The statute being constitutionally attacked, however, applies to both.

If the UCC warehouseman's sale provisions constitute state action as regards commercial warehouses, then the Court should, in deciding the due process question, recognize that the decisions regarding consumer transactions such as *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972); and *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600 (1974), should not be extended to the sale by a warehouseman of goods stored by a merchant in the course of his business.

These cases involve a type of property and interest which is not involved in the merchant-warehouseman bailment situation.

Even *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975), which extends these cases into the commercial arena, should be limited to the facts of that case. It should not be extended to invalidate the warehouseman's sale of the goods of a merchant stored in the course of his business.

The statute as written contains adequate safeguards to satisfy due process in the commercial setting. Prior notice must be given of the amount due and the proposed sale. A merchant who disputes the amount can reclaim his goods and sue on the contract dispute, or can allow the goods to be sold and sue on the dispute. The warehouseman is not the judge and jury on this issue, as is suggested in *Cox Bakeries of N. D.* v. *Timm Moving & Storage, supra,* at pp. 360-361, since the merchant can sue on the contract and r[illegible]r if he is correct. Also, a sale which does not compl[illegible] the statute is void and the owner of the goods may recover the value of the goods in a conversion action. *Flores* v. *Didear,* 12 UCC Rep. 168, 489 S. W. 2d 406 (Tex. Civ. App. 1972).

The relationship among businessmen dealing in a commercial setting is constitutionally different. In *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174, 187-188 (1972), the Court concluded that a cognovit clause is not, *per se,* violative of due process:

> "The facts of this case . . . are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack."

The Court further notes that facts such as the relative bargaining power of the parties, whether the contract is one of adhesion, the benefit received by the debtor, and the defenses which can be asserted by the debtor are salient factors to be considered in the due process equation.

In *Mitchell* v. *W. T. Grant Co., supra,* the Court again specified that the *Fuentes* holding was not an absolute rule. There must be a balancing of the interests of the parties involved. "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well". *Mitchel* v. *W. T. Grant Co., supra,* at page 604.

Not only is a balancing of interest required, but the Court also recognized that the type of property involved and the entire circumstances surrounding the transaction are important to a determination of whether due process requires a hearing.

Applying the standards developed in these recent decisions to the warehouseman's lien, when commercial and industrial products are involved, it is obvious that the lien should be upheld. The parties storing goods in merchandise warehouses are business corporations and merchants. They are knowledgeable concerning commercial practices and deal with the merchandise warehouseman from an arms-length position. The contract is not one of adhesion, and the merchant is, at least, the equal of the warehouseman. Often the bailor in such circumstances is a nationwide company with far greater resources than the warehouseman's.

The goods so stored are those raw materials and finished products dealt with by the merchant in the course of its business. They are not personal items of property used by individuals. The products are moving in the stream of commerce. The creation of the lien or its execution under the statute does not deprive an individual of any necessaries or similar specialized property that has been accorded due process protection.

The authority to sell is limited to the goods stored with the warehouseman. There is no question of a power to seize and sell goods which are not the very ones involved in the storage. The sale power is limited and appropriately protected in the circumstances.

Other courts have distinguished between the commercial situation and the consumer cases. In *American Oil Company* v.

McMullin, 433 F. 2d 1091 (10th Cir. 1970), the plaintiff sought damages for money advanced to and property wrongfully converted by defendant in his lease and operation of a service station and cafe. The court rejected defendant's argument that a garnishment and attachment of his property were precluded by *Sniadach, supra,* stating:

> "We do not think that *Sniadach* was intended to preclude all attachments and garnishments merely because some hardship may result". 433 F. 2d at page 1096.

In *Brunswick Corporation* v. *J. & P., Inc.,* 424 F. 2d 100, 105 (10th Cir. 1970), bowling equipment sold under a conditional sales agreement was replevied and sold, after notice to the purchaser but before any hearing, and prior to any judgment in the replevin action. The court refused to find the taking and sale unconstitutional on the basis of *Sniadach, supra,* recognizing the distinction between the property and interests involved.

In *Swarb* v. *Lennox,* 405 U. S. 191 (1972), a companion case to *Overmyer, supra,* involving Pennsylvania's cognovit provisions, the Court specifically refused to rule that the statute was unconstitutional on its face. The circumstances surrounding the execution of the cognovit must be examined to determine whether the debtor effectively waived rights he would otherwise have possessed if there had been no cognovit provision.

The Court should specially find that the involved statute is not unconstitutional on its face and that the enforcement of the lien against a merchant warehousing goods stored in the course of its business is constitutional, recognizing the nature of the parties, the type of goods involved and the circumstances surrounding the transaction.

Not only is such a conclusion consonant with due process precepts, but it also recognizes the commercial importance of the warehouseman's lien. The lien plays an important part in facilitating the free flow of commerce. Merchandise is stored,

transportation charges advanced, and work done to the goods on the basis of the possessory lien. The credit risk of an individual warehouseman dealing with corporations located throughout the world is minimized by the lien. Absent the lien, prepayment procedures, and other restrictive policies would be required, all of which would merely raise the ultimate cost of consumer goods.

The lien, existing along with a carrier's lien since the early days of the common law, does not violate due process and neither does the enforcement provisions.

The products stored by merchandise warehouses are not the type of property that requires the specialized protection of a judicial hearing prior to sale. They are goods stored by merchants in the course of their business.

The decisions have not treated such goods as the type of specialized property that requires a hearing prior to sale. They have, instead, recognized a distinction as to such commercial property in the procedures which will satisfy due process.

When businessmen are dealing with each other under well recognized commercial practices, the requirements of due process need not warrant the careful protection circumscribing the dealings between a businessman and an uninformed consumer who has no bargaining power and little familiarity with legal procedures.

The sale provisions have existed for many years. The provisions now have nation-wide applicability, having been adopted in all of the States except Louisiana. They exist as a uniform standard for businessmen warehousing their goods throughout the United States. Such uniformity is important inasmuch as most goods warehoused in merchandise warehouses are those distributed nationally.

If the businessman does not want the goods sold, he can pay the charges and sue if there is a dispute over the amount. In commercial practice such a requirement does not violate due

process, but is a reasonable accommodation among competing interests. It is not so oppressive, recognizing the type of goods and the parties involved, as to require a judicial hearing prior to sale.

The statute embodies legitimate commercial objectives, provides reasonable protection of the competing interests in light of the property and persons involved, and should not be found to violate due process. Neither on its face nor in its implementation in the commercial setting is more required by due process than that which is set forth in the statute.

CONCLUSION.

This Court should reverse the opinion of the Second Circuit Court of Appeals and should remand for dismissal of the complaint because of a failure to show sufficient state involvement in the enforcement of the warehouseman's lien provision of Section 7-210 of the Uniform Commercial Code.

If, however, this Court should find federal jurisdiction, it should hold that the warehouseman's lien provisions of Section 7-210 do not violate due process in the circumstances of a merchant storing goods in the course of his business.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York (77-37),

Petitioner,

against

SHIRLEY HERRIOT BROOKS AND GLORIA JONES, et al.,

Respondents.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc. (77-25),

Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

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WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK (77-42),

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

Opinions Below

Opinion and order of the District Court (WERKER, D.J.) dismissing the action is reported at 404 F. Supp. 1059 (S.D.N.Y. 1975) (P. 31a).* Opinion of the Court of Ap-

*Numbers in parentheses refer to the Appendix to Petition for Writ of Certiorari (P. a).

peals for the Second Circuit reversing and remanding the complaint is reported at 553 F. 2d 764 (P. 3a). The order granting certiorari and consolidating the cases is dated October 3, 1977 and found at —— U.S. ——, 46 L.W. 3215 (Oct. 4, 1977).

Another opinion and order in the District Court (GURFEIN, D.J.), not the subject of this appeal, is reported at 63 F.R.D. 409 (S.D.N.Y. 1974) (P. 47a).

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented

Does a warehouseman's exercise of sale to enforce his lien, done in a manner specified by state statute, Uniform Commercial Code (U.C.C.) § 7-210(2), constitute action "under color of state law" within the meaning of 42 U.S.C. § 1983, or state action under the Fourteenth Amendment?

Statute Involved

Uniform Commercial Code (New York)

§ 7-210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained

by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be pub-

lished once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held.

The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

Statement of the Case

The order (P. 1a) upon which certiorari has been granted reversed an order of the District Court for the Southern District of New York, and remanded the action to the District Court in accordance with the opinion for decision on determination of the class and the constitutionality of § 7-210 of the Uniform Commercial Code. The Court of Appeals itself stayed its mandate (or order) pending certiorari.

Initially respondent Shirley Herriot Brooks, a resident of Westchester County, commenced the action in the District Court by summons and complaint dated September 21, 1973 challenging the warehouseman's lien and power of sale. U.C.C. §§ 7-209, 7-210. Thereafter the Attorney General and the several trade associations moved to intervene as defendants. At the same time the late Gloria Jones moved to intervene as a plaintiff, apparently because the initial plaintiff Brooks' household goods had been returned and Brooks thus no longer had any claim for injunctive relief. All motions were granted, 63 F.R.D. 409 (S.D.N.Y. 1974).

Then the plaintiffs moved for summary judgment and class action determination. Defendants Flagg Brothers,

Inc. and Henry Flagg cross-moved to dismiss. By order and decision of July 5, 1975, the District Court denied plaintiffs' motion(s) and granted defendants' motion, finding a lack of state action and consequently a lack of jurisdiction. 404 F. Supp. 1059 (P. 31a).

Plaintiff Jones paid defendant Flagg Brothers for the return of her goods after this decision. She received the household goods, although she claims not all of them (P. 12a, n. 7).

Plaintiffs took an appeal to the Court of Appeals for the Second Circuit. This was argued in February 1976. While the appeal was *sub judice* appellant (intervenor-plaintiff) Jones died. Later plaintiffs' counsel moved in the Court of Appeals to intervene her estate. This was not opposed and in an opinion dated April 7, 1977 leave was granted to substitute Jones' personal representative. (P. 25a, n. 16.) In the substantive portion of the opinion the majority of the Second Circuit panel reversed and remanded as noted, *supra*. The basis of the reversal was that the "combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action" (P. 17a). The majority consequently held there was "state action" in the warehouseman's exercise of his power of sale of goods on which he had a common law lien. It was held the federal court had jurisdiction. It should be pointed out that the warehouseman's lien, although challenged constitutionally in the complaint and held by the District Court not to be "state action" and part of the subject of the Notice of Appeal to the District Court, was not pressed in the Court of Appeals nor argued by appellants (P. 14a).*

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* In n. 10 (P. 14a) the majority opinion notes "they [appellants] state they wish to preserve this point for possible review

(footnote continued on following page)

The dissenting Judge (HOLDEN, D.J.) (P. 26a *et seq.*) stated that he agreed with the District Court that it was without jurisdiction and would affirm the dismissal of the action. Despite concern with the "plight" of plaintiffs, on the facts alleged the State of New York was not a participant in the "action" taken by defendant Flagg. Judge HOLDEN noted that the defendant retained the bailed property under an ancient common law lien and that while the complaint speaks of threats of sale, the remedy was not applied. The property had been returned to both plaintiffs before the appeal. He failed to find any state involvement in the private dealings between the warehouseman and bailors of stored property. No state agency or official had intervened. By law, since 1879, the enforcement of a warehouseman's lien had not been a function of the sheriff. The statute did not "command" the sale (7-209 and 7-210) as an exclusive remedy. The statutory history indicates an accretion of safeguards. Weighing the variables, the defendant warehouseman's exercise of allowable power was not state action within the Fourteenth Amendment.

After the order of the Circuit Court (P. 1a), the Court stayed its mandate pending the petition for certiorari (Order of May 4, 1977).

Facts

Respondents Brooks and Jones were residents of Mount Vernon, New York at the time they were evicted from their apartments pursuant to court order. The City Mar-

(footnote continued from preceding page)

by the Supreme Court." We wish to note, however, that the petitioners obviously have not raised this as a "question presented" in their petition for certiorari and respondents did not cross-petition, indeed opposing the application for the writ of certiorari which this Court granted. Thus at this time and as the law of the case, the warehouseman's lien is constitutional and not the subject of discussion.

shal* had accomplished the evictions, which resulted in the placement of respondents' household goods on the street. The moving company was not involved in the eviction order. Although there is some dispute, it is admitted that petitioner Flagg Brothers (or an employee) met there with respondents (two different incidents are involved) and took over the goods and stored them pending instructions from respondents. The mover also informed respondents, not surprisingly, that there was a charge for its services. There is some dispute as to the proper charges. Flagg Brothers thus moved the goods and stored them, expending time and labor.

Although some payments were made, in due course Flagg Brothers asserted its lien (U.C.C. § 7-209) by refusing to return the stored property until its charges were met. Respondents asserted that an unnamed employee of Flagg Brothers, never a party to the litigation, "threatened" respondents with sale of the goods. Flagg Brothers never took any statutory steps to proceed with the sale (U.C.C. § 7-210).

Summary of Argument

The passage of U.C.C. § 7-210 does not constitute state action within the Fourteenth Amendment to the United States Constitution. The action "threatened" here, sale of stored property, on which the warehouseman has a lien, is not a traditional function of the State. The mere existence of a statute authorizing the warehouseman's conduct hardly transforms an admittedly private matter into one involving the State of New York. The federal courts lack jurisdiction over the complaint.

A finding of state action cannot be based on the "fact" that by enacting the statute, New York (and 48 other states

* Originally named a party but discontinued as against him.

plus the District of Columbia) gave an uniquely governmental power to the warehouseman. It is grossly improper to analogize a sheriff's power (to seize property to execute a judgment) to the limited power of the warehouseman. The warehouseman's sale had never been a governmental function. It is a reasonable corollary of the lien and derived from it.

To advance a claim of affirmative state support to the warehouseman there must be a showing that the statute and its authorization of non-judicial sale were in direct contravention of a goal of the Fourteenth Amendment. Absent any racially discriminatory motivation in U.C.C. § 7-210, it is not a violation of any constitutional safeguard by the State of New York.

To hold otherwise and affirm the order below would subject nearly all private activity to the application of the Fourteenth Amendment and render the valuable requirement of state action meaningless.

Although not an issue now, U.C.C. § 7-210 provides notice and an *opportunity* to be heard, the hallmarks of due process which do not apply, at this time, to the case. A finding of unconstitutionality, if it were an issue, would have many undesirable effects upon both the warehouseman and his customer.

POINT I

The existence of U.C.C. § 7-210 does not constitute state action to bring the complaint within the jurisdiction of the Federal Courts.

The action of the New York State Legislature in enacting the Uniform Commercial Code should not be converted, as it was by the Court of Appeals, into state action bringing the complaint within federal jurisdiction, 42 U.S.C. § 1983, 28 U.S.C. § 1343. To do so was erroneous. In the first place, the petitioner moving company never invoked

its right of sale pursuant to U.C.C. § 7-210. It never took the steps necessary under § 7-210(2), the applicable section covering non-business stored goods, to hold a sale. The only operative facts herein were that respondents' goods were subject to the warehouseman's lien and retained thereunder. The lien not being in issue before this Court, the retention was undoubtedly legal and presumably constitutional.* Thus non-judicial sale (§ 7-210) did not injure respondents as it was not exercised and the household goods have long since been returned.**

In the second place, assuming that respondents have standing or a real case or controversy, it is not a matter of dispute that there must be state action before the District Court has jurisdiction of the complaint. It is a basic premise in cases of this type (P. 7a, 34a). This requirement follows from the Fourteenth Amendment, Sec. 1 (in pertinent part):

> ". . . No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive *any* person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis supplied).

In other words, the Amendment applies only to States, not to private conduct. This is made quite clear by the latest decision of this Court as to the scope and meaning of

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* If, as respondents seems to argue by now only challenging the sale provision and not the lien, the moving company simply invoked the lien, U.C.C. § 7-209, and never utilized § 7-210, they would have a tenable state claim. *Morgan* v. *Murtha,* 18 Misc. 438, 42 N.Y.S. 374 (App. T., 1896).

** This raises an issue of standing and justiciability, as a matter of the case or controversy requirement associated with Art. III of the Constitution. The issue need not be raised by a party in its petition for certiorari—the Court must examine the issue. *Juidice* v. *Vail,* 430 U.S. 327, 331-333 (1977).

state action. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), it was held that termination of electric service by a utility company was not "state action". *Jackson* spoke (at 349) of the essential dichotomy in the 14th Amendment between deprivation by the State, subject to scrutiny, and private conduct, however discriminatory or wrongful, against which the Amendment provides no shield, citing the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Shelley* v. *Kramer*, 334 U.S. 1 (1948).

This distinction, even in racial discrimination cases, obviously not the case here, has been maintained. See *Evans* v. *Abney*, 396 U.S. 435 (1970), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

In a transparent effort to avoid the clear meaning of the *Jackson* decision, the majority of the court below seized upon this language in *Jackson*, at 353:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

Note that this Court did not say it would find state action in a delegation of power, such as eminent domain case, only that it was a "different case". This is far different even from dicta that a delegation of power constituted state action. Also the decision below ignores the numerous examples of traditional functions of the State, where private exercise of power was found to be state action. They are so far removed from the private relations involved here to amply demonstrate the erroneousness of the decision below. See, *e.g.*, the cases cited in *Jackson* at 352.

Nixon v. *Condon*, 286 U.S. 73 (1932)—an election case involving racial discrimination;

Terry v. *Adams*, 345 U.S. 461 (1953)—an election case involving racial discrimination;

Marsh v. *Adams*, 326 U.S. 501 (1946)—a free speech case involving a company town;

Evans v. *Newton*, 382 U.S. 296 (1966)—a racial discrimination case involving a traditionally public park.

The sequel to *Evans* v. *Newton, supra*, is *Evans* v. *Abney, supra* (396 U.S. 435), which, as noted, found no state action and indicates that even in cases where there is a racial issue, there are limits to finding state action.

The court below did not find itself deterred from finding state action in U.C.C. § 7-210. It concluded that the passage by the New York legislature of U.C.C. § 7-210, derived from an 1879 statute, was a delegation of a distinctly governmental power and expansion of common law remedies. Besides not being supported by any decisions of this Court (the opinion fails to cite any), the holding is not even arguably supported by any authority in its own Circuit. It only cites dissents (18a) and state court decisions (P. 18a, n. 11) which are inapplicable. Thus it cites *Blye* v. *Globe-Wernicke Realty Co.*, 33 NY 2d 15, 347 N.Y.S. 2d 170 (1973), which involved only the hotel's imposition of a lien by seizing baggage, not the subsequent sale.* *Sharrock* v. *Dell Buick Cadillac Corp.*, 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977), a garageman's lien case, is presently on appeal to the New York Court of Appeals by virtue of a grant of leave to appeal.

In addition, the dissent below, which notes that for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges, also notes the statute does not "command" that § 7-210 be used. The warehouseman's sale cannot properly be compared to a sheriff's sale. While the warehouseman

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* Although *Blye* may be the law of the New York courts, it hardly is an acceptable or correct exposition of the law here. See *Davis* v. *Richmond*, 512 F.2d 201, 203 (1st Cir. 1975); *Anastasia* v. *Cosmopolitan Nat. Bank*, 527 F.2d 1250 (7th Cir. 1975), *cert. denied*, 424 U.S. 928.

may bring an action and use a sherff to execute the lien, the sheriff has a role and power which readily distinguishes him from a warehouseman. The sheriff can and usually does seize the property from the debtor which he then sells to satisfy the execution. This is his traditional role—the exercise of force, a traditional state power—over the debtor. In obvious contrast, the warehouseman does not have this power—he cannot use force—and the state has not delegated it to him. As the dissent cogently notes (P. 29a), "there has been an accretion of safeguards to the mutual benefit of the parties to the bailment."

Although the majority opinion cites R. Brown, *The Law of Personal Property,* § 108, at 519, § 119, at 588-89 (2 ed. 1955) (P. 19a), for the proposition that at common law the warehouseman could not sell the goods and apply the proceeds to the debt, it fails to note the complete situation. At common law, equity would not issue a decree for the power of sale. R. Brown, *supra,* § 119, at 590 citing *Thames Iron Works* v. *Patent Derrick Co.,* J & H (Ch.) 93 (1860), where it was noted that retention under the lien caused continuous expense but there was no precedent for a bill authorizing sale. The text comments:

> "The situation presented is obviously very undesirable. The goods, on which the lien is claimed, are, contrary to the usual policy of the law, withdrawn from all commercial transactions. They stand idle, of no use to their owner, the lienor, or society. Accordingly, in practically all states, statutes of greater or less general application are found which confer on the lienor the power of enforcing the lien either by sale of the chattel in question under suitable restrictions or by court proceedings against the owner of the encumbered property culminating in a judgment for the sale of the chattel to satisfy the lien claimed upon."*

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* Cited as an example was the New York Lien Law, §§ 200-210.

So long as the lien is valid, which it is, the option of non-judicial sale is a reasonable choice, setting forth a compromise of the property interests of the lienor and lienee. It properly recognizes the traditional right of a private party to alienate or sell property in his possession. While the state may and does regulate property, the right to dispose of it is one of the essential incidents of property. 63 Am. Jur. 2d, *Property,* §§ 2 *et seq.* Thus the warehouseman may sell the stored property in which he has an undeniable property interest by virtue of the lien but he must observe the statute, designed to protect the storer of household property. Any violation of the statute renders the warehouseman liable for damages, an entirely adequate remedy in the case of personal property. *Cf. Bankers Commercial Corp.* v. *Mittleman,* 21 Misc. 2d 1096, 198 N.Y.S. 2d 184 (Sup. Ct., N.Y. Co. 1960); *Hartford Ins. Co.* v. *Albertson,* 59 Misc. 2d 207, 298 N.Y.S. 2d 321 (Co. Ct., Westchester Co., 1969). The reasonableness of the statutory scheme has been noted and approved in another context (garageman's lien) in *Phillips* v. *Money,* 503 F. 2d 990, 994-995 (7th Cir. 1974), cert. den. 420 U.S. 934.

The determination below, besides containing a cogent dissent, admittedly is in direct conflict with *Melara* v. *Kennedy,* 541 F. 2d 802 (9th Cir. 1976). That decision, involving precisely the same Uniform Commercial Code provision as here, declined to find state action in the proposed sale of stored goods. It analyzed all the factors of which only two, Source of Authority, *id.* at 805, and Delegation of State Function, *id.* at 807-808, need be mentioned, since these are the only two reasons the opinion below found to give state action. As *Melara* notes, even though private enforcement of the lien was unknown at common law, this is not determinative of state action. This lack of common law origin is a factor of dubious worth *Melara* notes citing *Culbertson* v. *Leland,* 528 F. 2d 426 (9th Cir. 1975) where, with a dissent, the same court found state action in a landlady summarily seizing, as security for unpaid rent, an evicted tenant's household

goods pursuant to a state statute. In *Melara,* the challenged statute's age (120 years) was cited, and there was no claim that it was enacted so that the state could avoid its constitutional obligations. The statute created only the right to act and did not require such action to be taken. Citing *Jackson* v. *Metropolitan Edison, supra,* 419 U.S. at 357, it was said the moving company's "exercise of the choice allowed by state law where the initiative comes from [him] and not from the State, does not make [his] actions in doing so 'state action' for the purposes of the Fourteenth Amendment."

The second consideration, delegation of state function, was the last discussed by *Melara,* at 807-809. This theory of state action was not based on any decision of this Court but rather on *Hall* v. *Garson,* 430 F. 2d 430 (5th Cir. 1970), which *Melara* noted had never been accepted by the 9th Circuit.* *Hall* involved summary seizure—a function traditionally reserved to the state—and also there was no relationship between the property seized and the underlying debt. The landlord was granted by statute a roving commission. The warehouseman is in a vastly different position. The challenged action, non-judicial sale, required no seizure; and the property to be sold by the warehouseman is the basis of the underlying debt. Also cited was *Melara's* notice of the lien enforcement remedy.** For

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* Apparently it has not been accepted by the Second Circuit, although relied on, at least in the opinion below. Distinguishing *Bond* v. *Dentzer,* 494 F. 2d 302 (2d Cir.), *cert. den.* 419 U.S. 837 and *Shirley* v. *State National Bank of Conn.,* 493 F. 2d 739 (2d Cir. 1974), *cert. den.* 419 U.S. 1009 (1974), the opinion below relied on *Tedeschi* v. *Blackwood,* 410 F. Supp. 34 (D. Conn. 1976) which involved a statute empowering a police officer or motor vehicle inspector to impose a lien on an "abandoned" vehicle by towing it to a garage. *Tedeschi* obviously involved seizure by State officials and for that reason is distinguishable from the instant case or *Melara.*

** This was claimed below by Flagg Brothers but summarily rejected by the opinion (P. 9a, n. 3). Normally a bill of lading is given with the storage contract. Brooks' and Jones' cases had emergency factors, since the goods were on the street, literally following an eviction, not in issue here.

these reasons no state action was found by the *Melara* decision and correctly so, we submit.

We are aware that shortly after the case below was decided, the Eighth Circuit handed down *Cox Bakeries of N.D.* v. *Timm Moving and Storage,* 554 F. 2d 356 (8th Cir. 1977), involving a warehouseman's lien sale. It found state action. Besides citing the opinion below, the court seemed to rely on Justice BRENNAN's concurrence (and dissent in part) in *Adickes* v. *Kress & Co.,* 398 U.S. 144, 188, at 203 (1970), and the opinion in *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). Also noted was the age of the practice in California as recited in *Melara.* The statute in *Cox* was cited as N.D. Cent. Code § 41-07-16 and was said to date from 1967. This is the North Dakota Uniform Commercial Code, Pocket Part, p. 7 to 3 Uniform Commercial Code (U.C.C.), Uniform Laws Annotated. The U.C.C. (and this law in North Dakota) does have more ancient sources.

Cox is a particularly deficient decision because of its reliance on the concurrence in *Adickes* and the *Reitman* opinion. Both cases involve racial discrimination, at the heart of the purpose of the 14th Amendment. *Reitman* was based on state involvement through the passage of legislation which "encourages" an activity previously forbidden. *Melara* presumably failed to consider this a viable theory with respect to private creditor remedies.*

Outside the area of racial discrimination, the significance of the remedy under challenge being statutory and not com-

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* *Reitman* had already been distinguished by the Ninth Circuit because it concerned racial discrimination and "because the proposition approved there had been initiated for the purpose of authorizing what had before been expressly prohibited". *Adams* v. *Southern California First Nat'l Bank,* 492 F. 2d 324, 332 (9th Cir. 1974), *cert. den.* 419 U.S. 1006 (1974).

In contrast, Gilmore, 2 *Security Interests in Personal Property* [Little, Brown & Co. 1954], § 44.6 at 1238, notes "the sale of collateral (without a court order) is, always has been, and always will be the normal default procedure".

mon law concededly is not dispositive of the state action inquiry. *Cox* demonstrates the absurdity of using age as the test. To quote Burke and Reber, *State Action Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. Cal. L. Rev. 1, 47 (1973):

> "The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law."

The opinion below also quotes and agrees with this quotation, disputing only the author's conclusion. The opinion's conclusion that § 7-210 has a significant impact on "private ordering", however, we strongly urge, is erroneous. The assertion is based on an assumption the warehouseman is placed in a different position than any other creditor by the statute. In fact the warehouseman is in a different position because of his lien, U.C.C. § 7-209, which is not the subject of this case. The statute does not affect this at all. Unlike the usual creditor, the warehouseman already has possession of his security and has an undisputable property interest in same by virtue of his lien. In that regard many other businessmen are in the same position. N.Y. Lien Law §§ 200-210.

To condemn circumvention of the judicial process by nonjudicial sale is to place that process on an unwarranted pedestal. Even if the statute required institution of a suit before sale, this is no guarantee of a full hearing. The respondents herein would still have to avail themselves of the opportunity for a hearing, something they could have had in the instant action, by pleading a pendant state cause of action. On the other hand, the statute does not prohibit a hearing before or after sale. Once again, as the dissent herein aptly notes (28a-29a), no state official commanded use of § 7-210. The lack of state action is obvious.

Messrs. Burke and Reber, in a series of articles, 46 S. Cal. L. Rev. 1003 (1973) and 47 S. Cal. L. Rev. 1 (1973), *supra,* comprehensively review the requirement of state action and its application to the warehouseman's lien, among others. Uniformly, they reject an expansive reading of state action in the debtor-creditor relations. In 47 S. Cal. L. Rev., at 53, they note that decisions on state action preserve the historical role assigned the 14th Amendment and the institutional values inherent in the state action limitation on the reach of the Amendment. The opinion below fails to do so. The intent of the Amendment was to place a buffer between people and the government, not between debtors and creditors. See also 10 Loyola L. Rev. 465 (1977).

The assertion of the opinion below as to the altering of the "balance of power" between debtor and creditor by the statute and its predecessors (P. 21a) ignores the historic role that the states have played in defining and protecting property rights. *Katz* v. *United States,* 389 U.S. 347, 350-351 (1967) (general right to privacy):

> "But the protection of a person's general right to privacy . . . is like the protection of his property and of his very life, left largely to the law of the individual States." (n. omitted).

POINT II

U.C.C. § 7-210, regardless of state action, affords adequate due process.

Although the ultimate constitutional validity of U.C.C. § 7-210 is not a question on which certiorari has been granted, this Court should be reminded that due process is not violated even if there were state action and a continuing threat of its use. (The return of the goods totally eliminates this threat.)

Traditionally, due process requires a notice and an *opportunity* to be heard. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950). Section 7-210 clearly provides and requires notice. U.C.C. § 7-210(2)(a), (b), (c). It also provides a reasonable time for those concerned to make their appearance—the opportunity to be heard. U.C.C. § 7-210(2)(d), (e), (f) and (3). While the appearance normally discussed is in court, the statute is not defective for not requiring a court proceeding. *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944). The time provided by § 7-210(2) after notice and before sale (25 days) is ample. *Goodrich* v. *Ferris,* 214 U.S. 71 (1909) (10 days notice sufficient).

The scope of possibilities are broad during this period or afterwards. *Dininny* v. *Reavis,* 100 Misc. 316 (Sup. Ct., N.Y. Co., 1915), affd. 178 App. Div. 922, 165 N.Y.S. 97 (1st Dept. 1917), is in point.* The plaintiff there contended that Lien Law § 200 allowing public sale of a car to satisfy a lien for storage was unconstitutional because it provided no opportunity for a hearing in case the owner disputed the amount of the lien. Therefore, he said, there was a

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* We are aware *Sharrock* v. *Dell Buick-Cadillac,* 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1971), *supra* is to the contrary. We are appealing *Sharrock* and rest on the correctness of *Dininny,* despite its age.

taking of property without due process. This is the same issue as the respondents present in the instant complaint. *Dininny* states that the amount of the lien is the "sum due" from the owner, not the sum claimed by the lienor. The latter has no protection if he makes a wrongful claim. If he demands more than is actually due, he is liable for conversion and must pay damages. The owner of the goods may dispute the sum and the law provides many remedies. To quote *Dininny,* 100 Misc. at 317-318:

> "He [the owner] can tender the amount, if any, which he claims that he owes and replevy the property from the possession of the lienor if he then refuses to surrender it. He can pay the amount claimed by the lienor and recover back any excess over what was actually due as money paid under duress. If the property is illegally threatened with sale, he can enjoin the sale and determine in the injunction suit what the proper amount of the lien is. He can let the sale proceed and sue all parties concerned for the conversion of his property."

In the present case the respondents' past difficulties were not in the absence of due process but in the failure to plead a cause of action which would entitle them to any relief before the sale. It is undisputed that the household goods were delivered for moving and storage. The duration of the storage became open-ended. While respondents suggest no consent to store (a state defense) and that the amount of the lien may be excessive, the fact also undisputed is that they made no reasonable tender to the warehouse until the action was dismissed in the District Court.

The right of the warehouse to effect the sale to satisfy the lien cannot be defeated due to the refusal or inability to pay the proper amount of the lien any more than the pawnbroker or the banker with whom stock or other securities have been pledged for a loan can have their rights

defeated. Indeed, in each of these instances unless a convenient and relatively speedy method of satisfying the lien was provided for, the particular type of business transactions would be substantially hampered. In the case of the warehouseman particularly, any such restriction as implicit in state action finding and rigorous application of due process would have a contrary deleterious effect to such persons as respondents, since it would inevitably result in the warehouse insisting on substantial payment in advance, even for preliminary moving and storage.

Specifically as to the warehouseman's lien, see *Magro* v. *Lentini Bros Moving and Storage,* 338 F. Supp. 464 (E.D.N.Y. 1971), affd. 460 F. 2d 1064 (2d Cir. 1972), cert. den. 406 U.S, 961 (1972), which is still valid as to the constitutionality of non-judicial sale via U.C.C. § 7-210. While the concurring decision (TIMBERS, J.) in *Hernandez* v. *European Auto Collision,* 487 F. 2d 378, at 383 *et seq.* (2d Cir. 1973) thought otherwise, this was before the limitation of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) contained in *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974).* *Hernandez* was also recognized by the opinion below not to be binding precedent due to its ignoring of state action (P. 25a).

This Court in *Lindsey* v. *Normet,* 405 U.S. 56 (1972), on a due process challenge to the Oregon Forcible Entry and Wrongful Detainer Statute, a landlord-tenant situation, made the cogent statement, at 74: "But the Constitution does not provide judicial remedies for every social and economic ill". It was there noted by this Court that the landlord had a constitutional right not to have his property or income confiscated.

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* The application of *Sniadach* v. *Family Finance,* 395 U.S. 337 (1969), including *Fuentes* and *Mitchell* plus *North Georgia Finishing Co.* v. *Di-Chem Inc.,* 419 U.S. 601 (1975) to the instant case is misplaced. All involve public officials and court ordered pre-judgment *seizures.* This clearly is not the case herein. State action was not an issue in the above cases.

To paraphrase *Lindsey* (405 U.S. at 74-75), the Constitution has not federalized the substantive law of warehouseman-customer relations. Judicial hearings are not required where there is proper notice. *Anderson National Bank* v. *Luckett, supra,* 321 U.S. 233 (1944); *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276, 283 (1925); *Huling* v. *Kaw Valley Co.,* 130 U.S. 559, 563-564 (1889); *Ballard* v. *Hunter,* 204 U.S. 241, 254-257, 262 (1907).

In sum, U.C.C. § 7-210 would not be subject to successful challenge on the ground of lack of procedural due process if that question were before the Court. While providing the warehouseman with a relatively speedy and economical method of disposing of moved and stored goods to satisfy the lien, it provides adequate means to the owner of the property to assert any objection thereto by instituting judicial action. *Dininny* v. *Reavis, supra; Lindsey* v. *Normet, supra,* 405 U.S. at 66. This must be preceded by adequate notice, here at least 25 days, so that a fair opportunity is accorded to mount judicial action prior to the sale. A prior *mandated* judicial hearing, apparently contended for by counsel for plaintiff and contemplated by the opinion below, is plainly not requisite. Whether the warehouseman serves a court summons or a sale notice, the storer still has to answer if he desires to challenge the lien. To paraphrase the District Court in *Magro,* keeping all these circumstances and possible legislative justifications in mind, there is no rational challenge to the procedure outlined in U.C.C. § 7-210 on due process grounds.

As in *Mitchell, supra* at 611-612, possession of the goods of the debtor is involved, not in issue here, and postponement of judicial inquiry, as to amount of the lien, is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate. Respondents herein could long ago have received a determination of the validity and amount of the lien, if they so chose. And unlike *Mitchell,* "seizure," the basis of state action, is

not at issue. Respondents had no right to possession of the stored goods absent payment or some security. They concede this by not contesting the lien, § 7-209, in the court below.

The fairness of placing the burden on respondents to initiate the legal challenge to the liens,* contrary to the concurring opinion in *Hernandez, supra,* 487 F. 2d 378, 383 *et seq.* has been recognized in *Phillips* v. *Money,* 503 F. 2d 990, *supra,* where the Seventh Circuit said (at 994-995):

> "In contrast here the voluntary surrender of the motor vehicle to the garageman, albeit for the limited purpose of performing authorized repairs, results in the garageman having both a legal property interest, in the form of a lien, and actual possession. Interference with the *status quo* would be necessary to enable the owner to regain possession prior to final judgment. Under these circumstances we cannot conclude that the Indiana procedure, permitting the repairman to retain possession and imposing on the car owner the burden of initiating litigation to challenge his right and resolve the disputes is fundamentally unfair. See *Hernandez* v. *European Auto Collision, Inc.,* 346 F. Supp. 313, 318-319 (E.D.N.Y. 1972), revd. 487 F. 2d 378 (2d Cir. 1973); *Adams* v. *Dept. of Motor Vehicles, supra.*"

Also relevant is the question of the worth of due process herein. See White, *The Abolition of Self-Help Repossession: The Poor Pay Even More,* 1973 Wisc. Law Rev. 503, at 504 which states the application of *Fuentes* v. *Shevin, supra,* to self-help repossession (similar to the warehouseman's lien situation) "is certainly undesirable and would

* Who must initiate judicial action is not determinative. Access to the court cannot be conditioned on ability to pay for costs. *Magro, supra* at 468, n. 9 citing *Boddie* v. *Connecticut,* 401 U.S. 371 (1971).

constitute due process gone berserk." The conclusion is also instructive (530-531):

> "In our demands for more and greater due process we lawyers have sometimes behaved like engineers gone berserk. Just as an engineer or an architect commissioned to do a job must be reined in and made to consider the costs, so the lawyer and judge must be made to measure the costs to society of these additional due process requirements. Moreover the lawyers and judges role is a more subtle one than the architects, for due process, unlike a new building, is nothing in and of itself. It has value only to the extent that it produces sounder and better results".

It is rather obvious that abolition of non-judicial sale will give no real benefit to the debtor but severely harm the creditor. Thus the creditor could still exercise his possessory lien indefinitely,* depriving the debtor of any benefit, but not be able to efficiently obtain compensation for his labor. A loss results to the debtor without any gain accruing to the creditor.

* State law now prohibits this. *Morgan* v. *Murtha, supra,* 18 Misc. 488, 42 N.Y.S. 374 (App T. 1896).

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York
November 14, 1977

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., et al.; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; and AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, et al.,

Respondents.

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

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OPINIONS BELOW.

The decision of the United States Court of Appeals for the Second Circuit has been reported in 553 Fed. 2nd 764.

The decision of the United States District Court for the Southern District of New York has been reported in 404 Fed. Supp. 1059, and the decision permitting the several defendants-intervenors to intervene has been reported at 63 FRD 409. [The defendants-intervenors are: (a) the Attorney General of New York; (b) The American Warehousemen's Association; (c) The International Association of Refrigerated Warehouses, Inc.; (d) the Warehousemen's Association of New York and New Jersey, Inc. - name changed from Warehousemen's Association of the Port of New York, Inc. 553 Fed. 2nd at p. 768, n. 8; and (3) The Cold Storage Warehousemen's Association of the Port of New York.] The defendants-intervenors mentioned in (a), (b) and (c) are petitioners herein, and those mentioned in (d) and (e) are respondents herein in support of the petitioners.

STATEMENT OF JURISDICTION.

This case comes to the Supreme Court by virtue of a granting on October 3, 1977 of writs of certiorari to the United States Court of Appeals for the Second Circuit (n.o.r.).

PROVISIONS OF THE UNITED STATES CONSTITUTION AND STATUTES INVOLVED.

(1) Fourteenth Amendment to the United States Constitution (to the extent here pertinent): "***no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) 28 U.S.C. §1343 (5): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

(3) 42 U.S.C. §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in-equity, or other proper proceeding for redress."

(4) The Uniform Commercial Code, (62-1/2 McKinney's Consol. Laws of N.Y.) §7-209 and §7-210 (A. 161a-164a).

THE QUESTION PRESENTED.

Does a warehouseman's exercise of non-judicial sale to enforce his lien in a manner specified by the Uniform Commercial Code §7-210, Subdivision 2, constitute action "under color of State law" within the meaning of 42 U.S.C. §1983 or State action under the Four-teenth Amendment?

STATEMENT.

By the original action, the plain-tiffs-respondents, Brooks and Jones, challenge the constitutionality of Uniform Commercial Code §7-209 and §7-210 pursuant to 42 U.S.C. §1983. The challenge was based upon the con-tention that a threatened lien enforce-ment proceeding respecting plaintiffs' household furnishings stored in the public warehouse of defendant-respondent, Flagg Bros., Inc. constitutes State action because the statute authorizing the enforcement, U.C.C. §7-210 (2) dele-gates to the warehouseman uniquely

governmental powers and expands the remedies available to the warehouseman beyond those which he possessed at common law (Brooks v. Flagg, 553 Fed. 2nd at p. 769; A. 15a, 16a). The District Court dismissed the action holding that "***plaintiffs have failed to show suf-ficient State involvement in the enforce-ment of warehousemen's liens to confer jurisdiction upon a Federal District Court under 28 U.S.C. §1343 (3), or to state a claim under 42 U.S.C. §1983." (A. 141a-152a.) By a divided Court, the Court of Appeals for the Second Circuit reversed the District Court's dismissal of the complaint. The majority found that the sale provisions were statutory in nature and were in the nature of a public function sufficient to conclude that "State action" was involved. The dissenting Judge, in effect, affirmed the District Court's opinion that at no time has the enforce-ment of a warehouseman's lien been con-sidered a public function involving the State to a significant degree. The Court of Appeals remanded the action to the District Court for class action deter-mination, and for further proceedings to determine the issue of whether the enforcement procedure under the Uniform Commercial Code satisfies the due process. (Majority opinion, A. 159a-168a; dis-senting opinion, A. 187a-191a.)

THE ARGUMENT.

POINT I

NEITHER THE WAREHOUSEMEN'S LIEN (§7-209, N.Y. UNIFORM COMMERCIAL CODE) NOR ITS ENFORCEMENT (§7-210, SUPRA) CONSTITUTES STATE ACTION.

The sine qua non for the maintenance of the subject action is a significant involvement of the State to the extent that the warehousemen's enforcement, actual or threatened, "[might] be fairly treated as that of the State itself." Jackson v. Metropolitan Edison, 419 U.S. 345, 351. To the same effect: Moose Lodge v. Irvis, 407 U.S. 163, Reitman v. Mulkey, 387 U.S. 369, Burton v. Wilmington Parking Authority, 365 U.S. 715.

The tests for determination of the requisite, significant State action or involvement were well articulated in Jackson v. Statler, 496 F.2d 623 (2nd Cir.) cert. den. 420 U.S.927, i.e.,

> "(1) The degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms. Each of these factors is material, no one factor is conclusive."

The case herein meets none of the enumerated tests.

The bailment relationship that springs up upon the basis of the storage of goods in a public warehouse is a private, contractual relationship. There are no involvements with any governmental agencies or officials, regulatory or otherwise, nor do the allegedly offending sections delegate any power to any such agencies or officials. Moreover, as stated by the dissenting Judge in the Court of Appeals decision below, "Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute State action." (A. 190 a.) More specifically, the warehousemen's lien enforcement procedure does not fall within the purview of the category of actions that are normally performed by a public official.

In the enforcement procedure, there is no need for the intercession of any public official such as, for example, a sheriff, as would be the case in instances where there is the necessity as the first step in an enforcement procedure to seize goods or property in order to satisfy a claim arising from an issue not related to the rem. James v. Pinnex, 495 F.2d 206.

Neither the enactment of §7-210, New York Uniform Commercial Code, nor of its predecessor statute, §118, General Business Law, conferred upon public warehousemen any powers or functions which are essentially governmental.

All lien enforcement procedures are not necessarily govermental functions. The enforcement of a lien arising from possession is not traditionally a function of the sheriff. His office is normally called into play, only where there is a need to seize property in order to achieve the remedy. Shirley v. State National Bank, 493 Fed. 2nd 739, cert. den. 419 U.S. 1009; James v. Pinnex, Supra.

The conclusion of the District Court that there was a failure to show sufficient State involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a Federal Court is sound, and comports with the weight of authority. Bond v. Dentzer, 494 Fed.

2nd 302, cert. den., 419 U.S. 837, Shirley v. State National Bank, Supra.

POINT II

THE PROCEDURAL SECTION OF THE UNIFORM COMMERCIAL CODE, 7-210 (2) AUTHORIZING ENFORCEMENT OF THE WAREHOUSEMEN'S LIEN BY SALE IS A REAFFIRMATION OF AN ANCIENT STATUTORY RIGHT. AS SUCH, THIS SECTION SHOULD BE AFFORDED THE SAME WEIGHT AND TREATED AND REGARDED IN THE SAME LIGHT AS A RIGHT FOUNDED UPON ORTHODOX COMMON LAW ANTECEDENTS.

The Court of Appeals opinion points out at A. 174a and 175a that by enacting U.C.C. §7-210, New York expanded the warehouseman's remedies "far beyond those existing at common law." Thus, the implication is clear that if the common law conferred upon the warehouseman both the possessory lien and the right to sell in order to achieve a satisfaction of the lien, State action might not be involved, and the subject action would therefore fail. It is, however, significant that §7-210 (2) was not an innovation of the Uniform Commercial Code; it was virtually a reenactment of a statute in effect since 1879 (A. 175a, note 14). It is, accordingly, submitted, that where, as here, a principle is the offspring of an ancient legislative enactment that

came into being after the adoption of the Fourteenth Amendment (A. 175a, note 13), it deserves to be afforded great weight. For nearly 100 years, enforcements in accordance with the defined rules and safeguards of the statute and an "accretion of safeguards" has been achieved without any significant State involvement. Bond v. Dentzer, 494 Fed. 2nd 302, cert. den. 419 U.S. 837; Shirley v. State National Bank, Supra.

POINT III

THE ISSUE AT BAR RELATES TO THE ENFORCEABILITY OF THE POSSESSORY LIEN BASED PURELY UPON STATUTORY AUTHORIZATION THEREFOR. THE ISSUE HAS NO RELEVANCE TO ENFORCEMENTS BY SALE PURSUANT TO CONTRACTS.

The right to enforce the possessory lien is not wholly dependent upon the grant of statutory authority; this right may be grounded on contract and, indeed, as pointed out below by the petitioner Flagg, it is the custom in the public warehouse industry to provide by contract for the lien and sale of the goods to enforce payment (A. 113a). Thus, the decision by this Court on the question presented should have no bearing upon the right to achieve an enforcement based upon contract between bailor and bailee. There is, patently, nothing governmental about such an enforcement. It is based upon and con-

stitutes a purely private transaction in which the State plays no role whatsoever.

CONCLUSION.

No significant State involvement is present or demonstrable when a warehouseman exercises a non-judicial sale to enforce his lien. The decision of the District Court in dismissing the complaint was proper and it merits approval and reinstatement.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

Nos. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, Inc., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, Inc.,

vs.

Petitioners,

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, Inc. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

BRIEF FOR RESPONDENTS.

Question Presented.

Whether the warehouseman's sale of bailed goods pursuant to New York Uniform Commercial Code, §7-210 constitutes state action on the grounds that New York has delegated the governmental functions of lien enforcement and binding, non-consensual dispute resolution to warehousemen, and that New York has specifically authorized and encouraged warehousemen to perform acts which, if performed by the State, would violate the Fourteenth Amendment?

Statement of the Case.

A. Preliminary Statement.

This action was commenced as a class action pursuant to Rule 23(a) and (b) (2) of the Federal Rules of Civil Procedure. The complaint seeks injunctive and declaratory relief and damages pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3). The complaint challenges the constitutionality of New York Uniform Commercial Code, §§ 7-209 and 210. Section 7-209 authorizes warehousemen to impose a lien by detaining bailed goods indefinitely without providing the owner of the goods with an opportunity for a hearing at any time. Section 7-210 authorizes warehousemen to enforce these liens by selling the goods without ever providing the owner of the goods with an opportunity for a hearing. The issue before the Court is whether the warehouseman's enforcement of this lien pursuant to Section 7-210 constitutes state action within the meaning of the Fourteenth Amendment and conduct "under color of" state law under 42 U.S.C. §1983.

B. Statement of Facts.*

1. *Plaintiff Brooks*

Plaintiff Shirley Herriott Brooks is a widow who resides with her three minor children (A. 9a, 75a). She has been employed as a nurse's aide and as a homemaker, earning approximately $100 per week. (A. 9a, 75a).

In June, 1973, an order of eviction was entered against Mrs. Brooks in the City Court of Mount Vernon. (A. 10a, 75a). On June 13, 1973, the City Marshal removed plaintiff's possessions from her apartment. Mrs. Brooks told the City Marshal that she wanted to call someone to store her household goods. He informed her that she could not contact anyone, and that defendant Henry Flagg, President of defendant Flagg Brothers, Inc., who had accompanied the City Marshal to plaintiff's residence, was the person who would store her goods. (A. 10a, 75a).**

Defendant Flagg informed plaintiff that she would have to pay $65 per month to move and store her furniture. (A. 11a, 75a). Believing she had no other choice, she told Mr. Flagg to proceed with the moving and storage of her furniture and household possessions. (A. 11a, 75a).

After the goods were loaded onto one of Flagg Brothers' trucks, a moving man told Mrs. Brooks that she would

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*Since the case is before the Court for review of the Court of Appeals' reversal of the district court's order granting defendants' motion to dismiss the complaint, the allegations of the complaint must be accepted as true. *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974); *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957).

**A claim against the City Marshal pursuant to 42 U.S.C. §§ 1983 and 1985 was dismissed without prejudice by agreement of the parties.

have to pay $75 per month for storage, $75 for barrelling and platforming and $28 for fumigating, for a total of $178 (A. 11a, 75a). Plaintiff protested that she had been told that $65 would be the entire cost, but again believing she had no choice, paid defendant Flagg $178. (A. 11a, 75a).

On June 15, 1973, Mrs. Brooks called defendant Flagg Brothers in order to find out how long it would store her goods for the $178 payment. (A. 11a, 75a). She was informed by an employee of Flagg Brothers that she owed defendants an additional $156. (A. 11a, 76a). On June 19, 1973, she was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" which showed that Flagg Brothers regarded the $178 as a "deposit" and that Flagg claimed a balance due of $156. (A. 11a, 18a-19a, 76a).* When plaintiff told defendant Flagg that his prices were unreasonable, she was informed that on July 1, 1973 she would owe an additional $75 for storage for the month of July. (A. 11a-12a, 76a). When plaintiff stated that her one month's storage payment of June 13, 1973 should run to July 13, 1973, defendant

*Plaintiff did not sign the bill of lading (A. 18a). In any event, the bill of lading and freight bill provided for a right of sale of non-perishable property only where the "property which has been transported to destination . . . is refused by consignee or party entitled to receive it upon tender of delivery or [where] said consignee or party . . . fails to receive it or claim within 15 days after notice of arrival of the property at destination. . . ." Bill of Lading and Freight Bill §4(b) (A. 19a). The provision manifestly had no application to the transactions between plaintiff and defendants since there was no refusal or failure by plaintiff to receive goods upon a tender of delivery at destination. The court below held that since plaintiff was not given this form until six days after defendant moved and stored her goods, and since the clause appears in minute print on a form provided by Flagg, she was not bound by the clause (A. 165a, n. 3). See *Fuentes v. Shevin*, 407 U. S. 67, 94-96 (1972).

Flagg informed her that storage charges were incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional $75 would be due by July 1, 1973. (A. 12a, 76a).*

On June 29, 1973, defendant Flagg informed plaintiff that she could have her goods if she paid the balance of the original bill, $156, plus $45. (A. 12a, 76a-77a). Plaintiff, however, was not able at that time to remove her goods from the warehouse. (A. 12a, 77a).

In early July, 1973, defendant Flagg's secretary informed plaintiff that she could remove her goods on August 14, 1973 only if she paid $484 in cash. (A. 12a, 77a). On August 25, 1973, plaintiff received a letter from defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be kept up or your furniture will be sold. Your previous bal. from
>
> | | |
> |---|---|
> | Moving due | 156.00 |
> | Storage for 7/73 & 8/73 | 150.00 at $75 a month |
> | Total due | 306.00" |
>
> (A. 12a-13a, 20a, 77a).

Accompanying this letter from defendant Flagg Brothers was a "Final Notice", dated August 22, 1973, informing plaintiff that $150 in storage costs was due and that "[u]nless such payment is made we will be obliged to

*Defendants' Statement Pursuant to Rule 9(g) of the Civil Rules of the Southern District of New York sets forth as disputed factual issues whether a valid contract existed between the parties, the rates agreed upon, and the reasonableness of the charges (A. 202-203).

advertise your goods for sale at public auction." (A. 13a, 20a-21a, 77a-78a). This notice was set forth in an official form labeled "Final Notice", *see* A. 116a.

Plaintiff and her attorney wrote to defendant contesting the reasonableness of the rates and the fact that they were repeatedly changing. (A. 13a, 20a-21a, 78a). Defendant Flagg's letter in response stated that plaintiff owed Flagg Brothers $482 and that "[h]er storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." (A. 13a, 24a-25a, 78a).

During this period, all of plaintiff's furniture and household goods were in defendant's warehouse. (13a-14a, 27a, 28a). The family had to sleep on the floor on the one remaining mattress they had, and had to get by without most of their clothes. (A. 13a, 78a-79a). Plaintiff missed a month and a half of work because her nurses uniforms were held by Flagg Brothers. (A. 78a).

Faced with the threatened sale of all of her goods, plaintiff instituted this action on September 21, 1973 for injunctive and declaratory relief and damages, claiming that Flagg Brothers' detention and threatened sale of her goods pursuant to New York Uniform Commercial Code, §§ 7-209 and 7-210 violate the Due Process Clause of the Fourteenth Amendment. (A. 14a-15a). On January 24, 1974, defendant voluntarily returned all of the stored goods to Mrs. Brooks. (A. 79a).

2. *Plaintiff-Intervenor Jones*

At the time Gloria Jones moved to intervene in the district court, her sole source of income was her net wages of approximately $87 per week. (A. 44a). By the time she moved for summary judgment, she was a recipient

of public assistance. (A. 80a). She resided in Mount Vernon, New York. (A. 44a, 80a).

In the fall of 1973, a judgment of eviction was entered against her by the City Court of Mount Vernon, and a warrant of eviction was issued. (A. 45a, 80a). On November 26, 1973, the City Marshal came to remove plaintiff's possessions from her apartment. (A. 45a, 80a). As with plaintiff Brooks, the City Marshal informed Mrs. Jones that she could only store her goods with defendant Flagg Brothers. (A. 45a, 81a). Employees of defendant Flagg Brothers then proceeded to load Mrs. Jones' goods and move them to a Flagg Brothers' warehouse without her authorization. (A. 45a, 81a). Plaintiff was not advised of the rate of storage. (A. 45a, 81a).

In March, 1974, plaintiff was informed by an employee of Flagg Brothers that she would have to pay $600 to acquire her household goods. (A. 46a, 81a). She was further informed that if she had not contacted Flagg Brothers at that time, her goods would have been sold. (A. 46a, 81a).

When plaintiff complained that defendant's rates were unreasonable and that she had not agreed to pay Flagg Brothers any sum for the storage of her goods, she was informed by an employee of defendant Flagg Brothers that she actually owed only $500, and that if she arranged to move her goods from the warehouse by her own means, the amount due would be reduced to $335. (A. 46a, 50a, 81a-82a). This employee also informed plaintiff that if she were unable to pay the bill by April 12, 1974, her goods would be sold. (A. 46a, 82a).

During this period, plaintiff was forced to reside without most of her household goods, clothing and other pos-

sessions. (A. 46a-47a, 50a-51a, 82a-83a). As a result, she was deprived of the companionship of her friends in her home, had to purchase fabric to make replacement clothing and suffered a nervous breakdown (A. 82a-83a).*

Faced with the threatened sale of her goods, plaintiff moved to intervene as a party plaintiff on April 11, 1974. (A. 40a-41a). In response to Mrs. Jones' motion to intervene as a plaintiff, defendants admitted that they had threatened to sell her goods, but stated that they had no present intention of selling the goods, "and if defendants do so decide, I will inform [Mrs. Jones' counsel] well in advance of any sale." (A. 66a).

Mrs. Jones' counsel subsequently received a letter dated May 21, 1974 from defendant's counsel stating:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1, through May 31 at the rate of $75.00 a month plus $35 *auctioneer's fees* or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot." (A. 85a-86a). (Emphasis added.)

By decision and order dated June 25, 1974, Mrs. Jones was granted leave to intervene as a party plaintiff. *Brooks*

*Defendants' Rule 9(g) statement sets forth as disputed factual issues whether a valid contract exists between the parties, the rates of storage and the reasonableness of the rates (A. 118a).

v. Flagg Brothers, Inc., 63 F.R.D. 409 (S.D.N.Y.).* Subsequent efforts by counsel to resolve the dispute between the parties failed. (A. 83a-84a, 86a-88a). By letter dated June 28, 1974, Flagg's counsel informed plaintiff's counsel that "Mr. Flagg will take whatever steps he deems necessary to protect his interests." (A. 83a-84a, 88a).

After the district court rendered its decision of July 7, 1975, dismissing the complaint for lack of jurisdiction, Mrs. Jones informed her counsel that she had paid defendant Flagg $1,600 for the return of her goods; that she had not received all of her goods from defendant Flagg; that some of her goods were returned in a damaged condition; and that she had not made the $1,600 payment voluntarily but only because of the threat of sale and the twenty month retention of the goods. (A. 168a n. 7, see also A. 86a-87a).**

Plaintiff Jones died while the appeal from the district court's judgment of dismissal was pending. (A. 168a n. 7). The Court of Appeals granted leave to substitute Jones' personal representative as plaintiff pursuant to

*The district court's decision granting leave to intervene is printed in the petition for certiorari in No. 77-37 at 47a.

**The facts that the parties stipulated to the propriety of the class action, A. 38a-40a, that plaintiff Jones alleges that she did not receive all of her goods, and that she did not pay the $1600 voluntarily but only because of the threat of sale and lengthy detention, defeat the Attorney General's suggestion that the controversy may not be justiciable. See *Brooks v. Flagg Brothers, Inc.*, 63 F.R.D. 409, 413 (S.D.N.Y. 1974). In addition, it should be noted that defendants charged plaintiff Jones an auctioneers' fee, apparently for a scheduled sale pursuant to Section 7-210 (A. 143a, 147a). An action challenging the validity of Section 7-210 on behalf of a person whose goods have been sold is pending in the Southern District of New York. *Svendsen v. Smith's Moving and Trucking Co.*, S.D.N.Y., 77 Civ. 2863 H.F.W. See page 12, n., *infra*.

Fed.R.Civ.P. 25(a). (A. 181a n. 19). Jones' son, Wayne Jones, has since filed an application for Letters of Administration of Gloria Jones' estate in the Surrogate Court of the State of New York, County of Westchester. No. 3906/1977.

C. Proceedings Below.

The action was commenced on September 21, 1973. (A. 1a, A.6a-A.27a).

In February, 1974, the parties stipulated to the propriety of the plaintiff and defendant class actions. (A.38a-40a). By decision dated June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as a party plaintiff. The Attorney General of the State of New York was permitted on consent to intervene as a party defendant to defend the constitutionality of the contested provisions. *N.Y. Executive Law,* §71. The American Warehousemen's Association, the International Association of Refrigerated Warehouses, the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York were also permitted to intervene as party defendants. *Brooks v. Flagg Brothers, Inc.,* 63 F.R.D. 409 (S.D.N.Y. 1974).

By notice of motion, dated August 26, 1974, plaintiffs moved for a class action determination and for summary judgment. (A.72-74a). By notice of motion dated September 19, 1974, defendant Flagg Brothers, Inc. and Henry Flagg cross moved to dismiss the action for failure to state a claim upon which relief can be granted. (A.97a).

By decision and order, dated July 7, 1975, District Judge Werker denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the com-

plaint "for lack of jurisdiction." *Brooks v. Flagg Brothers Inc.,* 404 F.Supp. 1059, 1061 (S.D.N.Y. 1975) (A.141a-157a). The court held that in enforcing the warehouseman's lien, the warehouseman does not act under color of state law within the meaning of 42 U.S.C. §1983 and the Due Process Clause of the Fourteenth Amendment.

On April 7, 1977, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case to the District Court to resolve the due process claim and to determine the scope of the classes. *Brooks v. Flagg Brothers Inc.,* 553 F.2d 764 (2d Cir. 1977) (A.159a).*

The Second Circuit found state action present in the warehouseman's enforcement of the lien pursuant to section 7-210 of the Uniform Commercial Code. The Court determined that state action was present because New York, by its enactment of section 7-210, delegated to warehousemen "a portion of its sovereign monoply power over binding conflict resolution" and also, the power to "execute a lien and thus perform a function which has traditionally been that of the sheriff." 553 F.2d at 771. (174a-177a). This delegation substantially enhanced the warehouseman's remedies beyond those he possessed at common law, where he had merely the power to retain but not the power to sell goods stored by a bailor. 553 F.2d at 771-772. (A.176a). The court concluded:

> "The action of the state in granting the warehouseman the privileged position he enjoys under §7-210,

*In their Brief for Appellants, p. 45, n., and again at oral argument, plaintiffs' counsel represented to the court below that plaintiffs have no objection to a modification of the scope of the class so as to include only persons engaged in consumer transactions. Plaintiffs agree with the court below that the due process requirements may be different in commercial transactions than in consumer transactions (A. 181a).

> even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment, it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action." 553 F.2d at 772 (A.176a-177a).

Judge Holden, dissenting, concluded that state action was not present because section 7-210 does not "command" the sale of goods, and because the statutory authorization allowing warehousemen to sell has existed since 1879. 553 F.2d at 775-777. (A.182a-184a).

The Court of Appeals granted defendants' motion to stay its mandate remanding the action to the district court pending proceedings in the Supreme Court. *Fed.R.App. P.*, 41(b).*

Summary of Argument.

This Court has held in *North Georgia Finishing, Inc. v. Di Chem, Inc.*, 419 U.S. 601 (1975), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), that no state may deprive a person of property without affording the owner an opportunity for a hearing. The mere fact that New York has not required "minor governmental functionaries", *Parks v. "Mr. Ford"*, 556 F.2d 132, 148 (3d Cir. 1977) (*en banc*) (Judge Adams, concurring), to be involved in the sale of goods by a warehouseman pursuant to section 7-210 of the Uniform Commerical Code should not deprive the owner of the bailed goods of the procedural safeguards this Court has sought to guarantee in *North Georgia Finishing, Inc., Mitchell, Fuentes* and *Sniadach*.

*On June 13, 1977, plaintiffs' counsel filed an action on behalf of Dorothy Svendsen, a person whose goods were sold pursuant to the contested statute. *Svendsen v. Smith's Moving and Trucking Co.*, S.D.N.Y., 77 Civ. 2863 H.F.W. As in the instant case, plaintiff Svendsen challenged the constitutionality of Section 7-210. This action is assigned to the same District Judge as the *Brooks* case. Plaintiff Svendsen did not move to intervene in the *Brooks* action only because of the stay of the Circuit Court's mandate.

New York, by enacting section 7-210 of the Uniform Commercial Code, has delegated to warehousemen the functions of lien enforcement and final, non-consensual dispute resolution, functions that historically and traditionally are governmental in nature. This conclusion is supported by (1) the determination of the highest state courts of New York that "in [New York] the execution of a lien . . . traditionally has been the function of the Sheriff", *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20 (1973); *Sharrock v. Dell Buick-Cadillac*, 56 A.D. 2d 446 (2d Dept. 1977); (2) the great weight of lower court authority throughout the country holding lien enforcement to be a public function, *see, e.g., Parks v. "Mr. Ford"*, 556 F. 2d 132 (3d Cir. 1977) (*en banc*); *Cox Bakeries of North Dakota, Inc. v. Timm Moving and Storage Inc.*, 554 F.2d 356 (8th Cir. 1977) (Mr. Justice Clark); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); *Hall v. Garson*, 430 F. 2d 430 (5th Cir. 1970); *Caesar v. Kiser*, 387 F.Supp. 645 (M.D.N.C. 1975); *Adams v. Department of Motor Vehicles*, 113 Cal.Rptr. 145, 11 Cal. 3d 146, 520 P.2d 961 (Cal. Sup.Ct. 1974); (3) the fact that at common law the enforcement of the lien was accomplished by a sale of the bailed property by the sheriff, Brown, *Personal Property*,

§121, pp. 602-603 (2d edition 1955); and (4) the fact that one of the most fundamental obligations of sovereignty is its duty to protect property by the judicial resolution of disputes. *See Boddie v. Connecticut,* 401 U.S. 371, 375 (1971); *Parks v. "Mr. Ford",* 556 F.2d 132 (3d Cir. 1977) (*en banc*); *Shirley v. State National Bank,* 493 F.2d 739, 747 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974) (Kaufman, J., dissenting).

Because New York has delegated to warehousemen functions traditionally and historically associated with sovereignty, state action is present in the performance of those functions. *Evans v. Newton,* 382 U.S. 296 (1966); *Terry v. Adams,* 345 U.S. 461 (1953); *Marsh v. Alabama,* 326 U.S. 501 (1946); *Nixon v. Condon,* 286 U.S. 73 (1932).

Without the sanction of section 7-210, warehousemen would not possess the extraordinary power to sell summarily another person's property. At common law, while the warehouseman had a possessory lien on the bailed goods, he did not have the right to sell the goods. Brown, *Personal Property,* §13.1, p. 394 (3d edition, 1955). To enforce a claim against the bailor, the warehouseman's remedy was "suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, *Personal Property,* §121, pp. 602-603 (2d edition 1955). New York, by obviating the need for the warehouseman to bring an action, prove his claim, and obtain and enforce a judgment, has authorized, sanctioned and "encouraged" him to deprive the bailor of his property without a hearing, *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Robinson v. Florida,* 378 U.S. 153 (1964), and has thereby become significantly involved in the contested activity.

This Court's decisions hold that state action is present where, as here, a statute specifically authorizes and encourages, even though it does not command, private individuals to perform acts which otherwise would be unlawful, and which the state itself could not perform consistent with the Fourteenth Amendment. *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Evans v. Newton,* 382 U.S. 296, 305-311 (1966) (White, J., concurring); *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 726 (1961) (Stewart, J., concurring); *id.* at 727 (Frankfurter, J., dissenting); *id.* at 728 (Harlan and Whittaker, JJ., dissenting); *Public Utilities Commission v. Pollak,* 343 U.S. 451 (1952); *Nixon v. Condon,* 286 U.S. 73, 85 (1932); *McCabe v. Atchison,* 235 U.S. 151 (1914). *See also Civil Rights Cases,* 109 U.S. 3 (1883).

I.

The warehouseman's summary sale of a bailor's goods constitutes state action because New York has delegated to warehousemen the governmental functions of lien enforcement and non-consensual dispute resolution and has specifically encouraged, authorized and sanctioned summary sales.

The contested statute authorizes a warehouseman to sell a person's goods and possessions as a means of enforcing his possessory lien for transportation and storage charges allegedly owed. *N.Y. Uniform Commercial Code,* §7-210. The warehouseman's exercise of his statutory authority thus works a final and complete taking of a person's property. The statute does not, however, require that the owner of the goods be afforded an opportunity for a hearing prior to the sale of his goods or at any time thereafter. Nor does the statute even require the warehouseman ever to institute an action on his claim. The contested statute delegates to warhousemen the power to determine *ex parte* the owner's liability for storage and transportation fees, and to enforce that determination by

the summary sale of the goods. As the fact patterns of the named plaintiffs show, the contested statute creates enormous potential for egregious abuse.

There is no question that a sale of a person's property carried out with the assistance of "minor governmental functionaries" performing purely ministerial tasks, *Parks v. "Mr. Ford"*, 556 F.2d 132, 148 (3d Cir. 1977) (*en banc*) (Adams, J., concurring), constitutes a final, complete and drastic taking of property within the meaning of the Due Process Clause. Under these circumstances, it is clear that due process guarantees that the owner of the goods be afforded an opportunity for a hearing prior to sale. *North Georgia Finishing, Inc. v. Di Chem Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In the instant case, the State has delegated to the warehousemen the power to deprive a person of property without an opportunity for a hearing.* The mere fact that New York, unlike the states in *Sniadach, Fuentes* and *North Georgia Finishing, Inc.*, has not required warehousemen to enlist "minor government functionaries to perform ministerial acts . . ." to assist the warehouseman in his "taking", should not cause "divergent conclusions as to the presence, *vel non*, of state action, particularly because the similarities are more significant." *Parks v. "Mr. Ford", supra*, at 148 (Adams, J., concurring).

In *Mitchell v. W.T. Grant Co., supra*, this Court, in upholding the constitutionality of the Louisiana sequestra-

*The taking in the instant case is greater, and the procedural protections less, than in *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing, Inc.* See *Parks v. "Mr. Ford"*, 556 F. 2d 132, 142-143 (3d Cir. 1977) (*en banc*); *Hernandez v. European Auto Collision, Inc.*, 487 F. 2d 378, 385 (2d Cir. 1973) (Timbers and Lumbard, JJ., concurring).

tion statute, relied on the statutory requirement that the creditor present the relevant facts to an impartial judge. "Mitchell was not at the unsupervised mercy of the creditor and court functionaries." *Id.* at 616. In contrast, a a person who stores goods in a warehouse is unquestionably at the "unsupervised mercy of the warehousemen" because of the warehousemen's power of summary sale under section 7-210. Since state control was essential to the conclusion that the statute in *Mitchell* conformed to due process requirements, New York's total abdication of that control in the instant case should not serve to insulate totally section 7-210 from the Due Process Clause.

The State's delegation of the traditional governmental functions of lien enforcement and binding non-consensual dispute resolution, together with the State's specific statutory authorization which allows warehousemen to conduct summary sales, supports the decision of the court below that the state is significantly involved in the contested activity. *Accord, Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir. 1977) (*en banc*)*; *Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.*, 554 F.2d 356 (8th Cir. 1977) (Mr. Justice Clark); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975); *Hall v. Garson*, 430

*Every one of the nine judges of the Third Circuit Court of Appeals in *Parks v. "Mr. Ford"*, 556 F. 2d 132 (3d Cir. 1977) (*en banc*) was in agreement as to the presence of state action with respect to the sale provision of the Pennsylvania garageman's lien law. The Pennsylvania statute is virtually identical to the contested statute herein. Not one of the several defendants has even cited *Parks*, much less attempted to distinguish it or show that it was wrongly decided. Defendants rely upon *Melara v. Kennedy*, 541 F. 2d 802 (9th Cir. 1976). *Melara* is distinguishable in that it involved a contractual power of sale. *Id.* at 807. As is discussed more fully *infra*, there is neither a contractual nor common law power of sale in the instant case. The power of sale derives *solely* from the contested statute.

F.2d 430 (5th Cir. 1970); *Caesar v. Kiser,* 387 F.Supp. 645 (M.D.N.C. 1975); *Cockerel v. Caldwell,* 378 F.Supp. 491 (W.D.Ky. 1974) (three-judge court); *Adams v. Department of Motor Vehicles,* 113 Cal.Rptr. 145, 11 Cal. 3d 146, 520 P.2d 961 (Cal.Sup.Ct. 1974); *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15 (1973).

The court below applied the test set forth in this Court's decision in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974), that is, "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (171a). This test was set forth in *Jackson* in the context of a claimed violation of procedural due process—the same claim asserted in the instant case. Since the court below employed the proper state action standard, the essential question concerns the application of this standard to the instant case.

This is not a case like *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) or *Jackson v. Metropolitan Edison Co., supra,* where the state involvement with the private entity was peripheral, tangential and unrelated to the contested activity. Here, the State, in authorizing warehousemen to sell bailors' goods, has specifically delegated to warehousemen the governmental functions of lien enforcement and binding, final, nonconsensual dispute resolution. There is thus a direct, significant and precise nexus between the State action and the contested activity.

This Court has consistently held that state action is present when the state delegates a function which is traditionally and historically associated with sovereignty. *Evans v. Newton,* 382 U.S. 296 (1966); *Griffin v. Maryland,* 378 U.S. 130 (1964); *Terry v. Adams,* 345 U.S. 461 (1953); *Marsh v. Alabama,* 326 U.S. 501 (1946); *Smith v.*

Allwright, 321 U.S. 649 (1944); *Nixon v. Condon,* 286 U.S. 73 (1932). "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton, supra* at 299.

The continued validity of this doctrine was recently reaffirmed by this Court in *Jackson v. Metropolitan Edison Co., supra* at 353, where the Court cited *Evans, Terry, Marsh, and Nixon,* and stated:

> "If we were dealing with the exercise . . . of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."•

It is not, of course, always easy to determine whether a function is governmental or private in nature. In the instant case, however, the conclusion of the court below that the functions involved are governmental in character is supported by an analysis of the following factors: (1) the position of the New York courts with respect to the nature of the function; (2) the conclusion reached by courts throughout the country; (3) the manner in which the function was carried out at common law; and (4) the relationship of the activity to the purposes of government and the values which the Fourteenth Amendment seeks to protect.

•"The underlying rationale of the state function cases is that a state may not delegate to the private sector a substantial degree of control over a traditional governmental function without subjecting the private sector to the requirements of the Fourteenth Amendment." Comment, State Action: A Pathology and A Proposed Cure, 64 Cal. L. Rev. 146, 167 (1976).

This Court has recognized that deference should be given to the determination by the State courts as to whether an activity constitutes a governmental function in that State. *Jackson v. Metropolitan Edison Co., supra* at 353; *Nixon v. Condon, supra* at 97 (McReynolds, J., dissenting). Cf. *Reitman v. Mulkey,* 387 U.S. 369, 374 (1967) ("careful consideration" given to the California Supreme Court's determination of objective, effect and historical context of the contested state constitutional provision); *City of Eastlake v. Forest City Enterprises,* 96 S.Ct. 2358, 2368 (1976) (Stevens, J., dissenting). While the question of state action is, of course, ultimately to be determined by this Court, *Nixon v. Condon,* 286 U.S. 73, 88-89 (1932), the state's highest state court is in the best position to evaluate whether a particular function is a governmental function in that particular state. Thus, in concluding that the furnishing of utility service did not constitute a public funciton, this Court in *Jackson* relied upon the fact that the Pennsylvania courts did not regard the furnishing of utility service to be the function of the State or local government. *Jackson v. Metropolitan Edison, supra* at 353, citing decisions of the Pennsylvania courts.

In sharp contrast to *Jackson,* the highest court in New York has concluded that lien enforcement constitutes a function traditionally and historically carried out by state officials. *Blye v. Globe-Wernicke Realty Co.,* 33 N.Y.2d 15, 347 N.Y.S. 2d 170 (1973); *Sharrock v. Dell Buick Cadillac Corp.,* 56 A.D. 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977); *see also N.Y. Lien Law,* §§ 41, 50, 206-210; *N.Y. RPAPL,* §1351; *N.Y.CPLR,* §§ 5230, 5233-5236, 6211, 6214-6216.

In *Blye v. Globe-Wernicke Realty Co., supra,* the New York Court of Appeals concluded that in New York, lien enforcement historically and traditionally has been the function of the sheriff:

> "In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52), traditionally has been the function of the Sheriff." *Blye v. Globe-Wernicke,* 33 N.Y.2d at 20; 347 N.Y.S.2d at 175.

The Attorney General contends that *Blye* is distinguishable on the ground that while a seizure of goods was involved in that case, the enforcement of the warehouseman's lien does not require a seizure of goods. The Court of Appeals in *Blye,* however, found that the innkeeper carried out a public function not because a seizure was involved, but because *"the execution of a lien . . .* traditionally has been the function of the Sheriff." *Blye v. Globe-Wernicke,* 33 N.Y.2d at 20, 347 N.Y.S.2d at 175. (emphasis added)* It was thus the function of lien enforcement, rather than its particular method, which was critical to the *Blye* court's conclusion that lien enforcement is a function which in New York historically and traditionally has been carried out by the sheriff.

*While a seizure may be necessary to enforce some liens, such as the innkeeper's lien, the New York legislature has recognized that a seizure is not always necessary to enforce a lien. Thus, when plaintiff already has possession of the property, there is no necessity for a seizure and the lien can be enforced by sale alone. See *N. Y. Lien Law,* §208. Cf. *N. Y. Lien Law,* §207 (the sheriff shall seize the chattel prior to sale when it is not in plaintiff's possession). In addition, both mechanic's liens and mortgages on real property may be foreclosed by sale by a sheriff or other public official without any need for seizure. *N. Y. Lien Law,* §41; *N. Y. RPAPL,* §1351. Cf. *Oysterman's Bank and Trust Co. v. Weeks,* 35 A. D. 2d 580, 313 N. Y. S. 2d 535, 537 (2d Dept. 1970) (sheriff need not make formal levy or seizure before foreclosing a judgment lien on real property). Even in those situations where the sheriff must seize the property, he must still also sell the property as a necessary step to enforcing the lien. *N. Y. CPLR,* §§ 5230, 5233, 5234, 5236. The sale by the sheriff is the precise function that the warehouseman performs when he enforces his lien under Section 7-210 of the Uniform Commercial Code.

The highest judicial authority in New York supports the view that lien enforcement is a state function regardless of whether or not a seizure is involved. *Sharrock v. Dell Buick-Cadillac Inc., supra.* The Court in *Sharrock,* concluded that a garageman, who enforces his statutory lien by sale, without seizure, and in the same manner as the warehouseman, "in executing his lien, like the innkeeper is performing the traditional function of the Sheriff. . . ." *Sharrock v. Dell Buick-Cadillac,* 56 A.D. 2d at 455, 393 N.Y.S.2d at 171.*

In addition to the decisions in *Blye* and *Sharrock,* the great weight of authority throughout the country has concluded, like the court below, that the non-consensual sale of a person's property to enforce a lien constitutes a public function. *Parks v. "Mr. Ford",* 556 F.2d 132 (3d Cir. 1977) (*en banc*) (enforcement of garageman's lien is state action because lien enforcement is the function of the sheriff); *Cox Bakeries of North Dakota, Inc., v. Timm Moving & Storage, Inc.,* 554 F.2d 356, 358 (8th Cir. 1977) (Mr. Justice Clark) ("[T]he state has delegated the traditional roles of judge, jury and sheriff to [the warehouseman] without providing for any judicial supervision or other safeguards."); *Hall v. Garson,* 430 F.2d 430, 439 (5th Cir. 1970) ("[T]he execution of a lien

*The defendants and the Attorney General have appealed the judgment of the Appellate Division in *Sharrock* to the New York Court of Appeals. As of the date of the submission of this brief, the briefs of all the parties in *Sharrock* have been filed in the Court of Appeals and counsel are awaiting a date for argument. In view of the importance which should be given to the determination of a State's highest court as to whether a particular function constitutes a public function, it is respectfully suggested that if there is any question whether the enforcement of a possessory lien is a public function in New York, this Court should defer decision in the instant case until a decision is rendered by the New York State Court of Appeals in *Sharrock.*

. . . has in Texas traditionally been the function of the Sheriff or constable."); *Johnson v. Riverside Hotel Inc.,* 399 F.Supp. 1138, 1140 (S.D.Fla. 1975) ("The execution of the Landlord's lien in Florida was traditionally a function of the Sheriff."); *Caesar v. Kiser,* 387 F.Supp. 645, 647 (M.D.N.C. 1975) (". . . the traditional governmental function of lien enforcement."); *Adams v. Department of Motor Vehicles,* 113 Cal.Rptr. 145, 11 Cal.3d 146, 520 P.2d 961, 965, 64 A.L.R.3d 803 (Cal.Sup.Ct. 1974) ("The State delegated . . . the traditional governmental function of lien enforcement."). In *Parks v. "Mr. Ford", supra* at 141, the Third Circuit Court of Appeals determined that

> "[b]y thus authorizing sales to take place, directing how they are to be carried out, and giving them the effect of judicial sales, Pennsylvania has quite literally delegated to private individuals powers 'traditionally exclusively reserved' to sheriffs and constables. In our view, that grant of power has the same effect for state action purposes as if Pennsylvania had endowed private individuals with the same authority to arrest suspects and to execute warrants as state and local police possess."

The contested statute authorizes warehousemen to perform the precise function that the sheriff performed at common law. Under the common law, a bailee was given "a possessory lien . . . for the value of his services" and permitted to "retain the chattel in his possession until the same be paid." Brown, *Personal Property,* §13.1, p.394 (3d edition 1975). The bailee, however, had "no right to sell the subject matter of the lien to reimburse himself for his debt unless such right [was] conferred expressly by statute or by special agreement between him and his debtor." *Id.* at §13.1, p.394; §13.1, p.390; §14.1, pp.446-447. *Accord, Hall, Possessory Liens in English Law,* p.67 (1917); Jones, *A Treatise on The*

Laws of Liens, §10, pp.1033-1034 (1888); Overton, *Treatise on the Law of Liens,* §14, p.10 (1883); 78 Am.Jur.2d *Warehousemen,* §122, p.260; 35 *N.Y.Jurisprudence, Liens,* §44, pp.234-235; ***Knapp Street and Co. v. McCaffrey,*** 177 U.S. 638, 645 (1900); *United States v. Toys of the World Club,* 288 F.2d 89, 95 (2d Cir. 1961).* "A warehouseman's lien, like other common-law liens, confers no right to sell the property to which the lien attaches, but only a right to hold it till the charges are paid." 2 L. Jones, *A Treatise on the Law of Liens,* §976, pp. 990-991 (3d edition 1914).

Under the common law, a bailee with a possessory lien who sought to enforce his claim resorted to the "expedient of suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, *Personal Property,* §121, pp. 602-603 (2d edition 1955); D. Overton, *A Treatise on the Law of Liens,* §14.1, p. 10 n. 1 (1883); Cowen, *Treatise,* P. 227 n. 6 (4th Edition 1858) 62 N.Y. Jurisprudence, *Warehouse Receipts,* §125, p. 747, n. 2; *Parks v. "Mr. Ford",* *supra* at 157 (Gibbons, J., concurring); *State v. Amarillo Transfer & Storage Co.,* 94 S.W.2d 590, 592 (Tex. Civ. App. 1936); *Jewett v. City Transfer and Storage Co.,* 128 Cal. App. 556, 18 P.2d 351 (1933); *Stewart v. Naud,*

*The enforcement of possessory liens is thus sharply distinguishable from the common law right of repossession enjoyed by secured parties. "Probably the chief obstacle to concluding that self-help repossession involves a traditional state function is the fact . . . that in one form or another the common law very early recognized repossession as a private remedy." *Gibbs v. Titelman,* 502 F. 2d 1107, 1114 (3d Cir.), *cert. denied,* 419 U. S. 1039 (1974). Accord, *Turner v. Impala Motors,* 503 F. 2d 607, 612 (6th Cir. 1974); *Adams v. Southern California First National Bank,* 492 F. 2d 324, 336 (9th Cir. 1973), *cert. denied,* 419 U. S. 1006 (1974). Similarly, the power to sell pledged property is distinguishable in that it derives from an "inherent or implied term of the contract." 13 Carmody-Wait 2d, *Encyclopedia of New York Practice,* §84:101, p. 223. See also, Brown, *Personal Property,* §15.1, pp. 469-470 (3d edition 1975).

125 Cal. 596, 58 Pac. 186 (1889).* In authorizing warehousemen to sell an owner's goods, section 7-210 thus authorizes warehousemen to perform the precise function that at common law had been the function of the sheriff. *See also Cox Bakeries v. Tim Moving and Storage, supra* at 358-359 ("The foreclosure of the lien was conducted by the sheriff under the supervision of the court."); *Mason v. Garris,* 360 F.Supp. 420, 422-423 (N.D. Ga. 1973) (three-judge court) (state statute authorized marshal to enforce garageman's lien).**

The power delegated by the State in section 7-210 obviates the necessity for a warehouseman to bring an action on his claim, obtain a judgment, and have the sheriff enforce that judgment, *Parks v. "Mr. Ford", supra* at 146-147 (Adams, J., concurring), or to bring a judicial foreclosure proceeding and obtain an order of sale. 2 L.

*Under the common law, to execute a money judgment, the court issued a writ of *fieri facias* to the sheriff which commanded "that he cause to be made of the goods and chattels of the defendant the sum or debt recovered." Blackstone, *Commentaries on the Laws of England,* Book III, §543, p. 2033 (Jones edition); Plucknett, *A Concise History of the Common Law,* p. 390 (5th edition 1956). See also, Westminister II, c. 18, p. 1285. "The writ of *fieri facias* is of great antiquity. . . . It is the writ most commonly resorted to. . . . The common law principles of the writ prevail generally, with modification, in the United States." Blackstone, *Commentaries of the Laws of England, supra,* at §543, p. 2033, n. 2.

**Sheriffs and constables also normally enforce landlord lien under distress for rent statutes. These statutes uniformly have been held unconstitutional by the federal district court. *Stroemer v. Shevin,* 399 F. Supp. 993 (S.D. Fla. 1973) (three-judge court); *Ragin v. Schwartz,* 393 F. Supp. 152 (W.D. Pa. 1975); *Adams v. Joseph F. Sanson Investment Co.,* 376 F. Supp. 61 (D. Nev. 1974); *Sheffer v. Holbrook,* 346 F. Supp. 762 (S.D. W. Va. 1972) (three-judge court); *Holt v. Brown,* 336 F. Supp. 2 (W.D. Ky. 1971) (three-judge court); *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970) (three-judge court).

Jones, *A Treatise on the Law of Liens*, §1038, pp. 1046-1047 (3d edition). *See, e.g., N.Y. Lien Law*, §206. The contested statute authorizes warehousemen to determine whether and how much the owner owes for transportation and storage costs, and to enforce this decision by selling the bailed goods. The State has thus delegated to warehousemen a portion of "the State's monopoly over techniques for binding conflict resolution." *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (Harlan, J.). *Accord, Parks v. "Mr. Ford", supra* at 146 (Adams, J., concurring) ("[c]onflict resolution is now seen as one of the core attributes of the sovereign."); *Cox Bakeries of North Dakota, Inc., v. Timm Moving & Storage, Inc., supra* at 358 (". . . the traditional roles of judge, jury and sheriff. . . ."); *Shirley v. State National Bank of Conencticut*, 493 F.2d 739, 747 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (Kaufman, J., dissenting); *Bond v. Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert.denied*, 419 U.S. 837 (1974) (Kaufman, J., dissenting). *See also, United States v. Kras*, 409 U.S. 434, 454-455 (1973) (Stewart, J., dissenting).

Defendant Flagg contends that dispute resolution is not a governmental function because the private sector often resolves disputes by such means as arbitration and voluntary settlement. (Brief for Petitioners Flagg Brothers, Inc. and Henry Flagg, p.29). Historically, it is of course true that parties have resolved disputes voluntarily through such methods as abitration, accord and satisfaction and settlement. Blackstone's *Commentaries on the Laws of England*, Bk. III §§24 *et seq.* (Jones edition). Parties may also by contract provide security for debts and agree that, in the event of default, the security may be sold. See, *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); see also, N.Y. Uniform Commercial Code §§9-102(a), 104(c), 204(1). The function

delegated by the State in the instant case, however, is not simply dispute resolution, but final, non-consensual dispute resolution, which is enforced by the forced and final sale of another person's property through the device of lien enforcement. A person whose goods are sold pursuant to section 7-210 stands in the position of a defendant in a judicial action who has had a judgment entered against him, and whose property has been sold by the sheriff in satisfaction of the judgment.

The difference between consensual and non-consensual dispute resolution is crucial. Compare, *Boddie v. Connecticut, supra*, with *United States v. Kras, supra.* As Judge Kaufman has concluded:

> "[T]he decisive difference between 'binding conflict resolution', on the one hand, and 'private structuring . . . and repair,' on the other, is the element of voluntary *mutual* consent, the presence of which permits the latter just as its absence requires the former. Accordingly where, as here, the creditor is empowered, whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process." *Shirley v. State National Bank of Connecticut*, 493 F.2d at 747 (Judge Kaufman, dissenting) (emphasis in original).

The Uniform Commercial Code provides that a "warehouseman is liable for damages" which result from his failure to comply with the procedures set forth in section 7-210 "and in case of willful violation is liable for conversion." *N.Y. Uniform Commercial Code*, §7-210(9).*

*In *Fuentes v. Shevin, supra*, at 83 n-13, this court noted that there was a "substantial possibility" that "uneducated, uninformed consumer[s] with little access to legal help and little familiarity with legal procedures" will not bring actions to test the validity of the creditor's sale.

This does not, however, detract from the fact that a sale of goods pursuant to section 7-210 constitutes final, non-consensual, binding dispute resolution with respect to the title of the goods sold. *See N.Y. Uniform Commercial Code,* §7-210(5), which protects good faith purchasers of goods sold to enforce a warehouseman's lien, despite the warehouseman's non-compliance with section 7-210. The power to determine finally the ownership rights in a chattel, "because of the drastic consequences, is necessarily an attribute of sovereignty." *See Parks v. "Mr. Ford", supra* at 164 n.2 (Hunter, J., concurring).

As the court below recognized, the power to sell another's property is "a truly extraordinary remedy." (173a). While the Attorney General contends that the right to dispose of property "is one of the essential incidents of property", Brief of Petitioner Lefkowitz, p.13, the incident of property is the right to alienate one's own property, not the property owned by another. While the warehouseman claims a possessory lien, it is at best a limited interest based on a disputed and unresolved claim for transportation and storage fees. In contrast, there is no question that the bailor is the owner of the goods. Brown, *Personal Property,* §107, p.505 (2d edition 1955); *Hernandez v. European Auto Collision,* 487 F.2d 378, 385 (2d Cir. 1973) (Timbers, J., concurring).

One of the great and essential functions of government is the protection of property rights by the judicial resolution of disputes. "The great and chief end, therefore, of men's uniting unto commonwealths, and putting themselves under government is the preservation of property, to which in the state of nature there are many things wanting." Locke, *Of Civil Government, Second Essay,* Ch. IX, §124 (Gateway). *See also Federalist Paper,* No.10 p.79; No.17, p.120 (Mentor edition); Blackstone, *Commentaries on the*

Laws of England, supra at Book II, §5 p. 1490 n.2. According to Blackstone, self help at common law was limited to self defense, recaption, re-entry on land, abatement of nuisances, distress, and the seizing of heriots. Blackstone, *Commentaries on the Laws of England, supra* at Book III, §§7-11,23. "The landlord-tenant relationship was one of the few areas where the right of self-help was recognized by the common law of most States, and the implementation of this right has been fraught with 'violence and quarrels and bloodshed.'" *Lindsey v. Normet,* 405 U.S. 56, 71 (1972). In our system of law, non-consequental dispute resolution by the courts is the norm and self-help the extremely limited exception. Pollack and Maitland, 2 *History of English Law,* Ch.IX, §2, pp. 574-575; Holdsworth, 3 *History of English Law,* Ch.II, p. 278; *Gibbs v. Titelman,* 369 F. Supp, 38, 45-47 (E.D. Pa. 1973), *rev'd,* 502 F.2d 1107 (3d Cir), cert denied, 419 U.S. 1039 (1974).*

It is one of the constitutional assumptions that the power of involuntary sale of property is limited to specific exercises of *governmental* power, such as the power of eminent domain, the enforcement of judgment liens, and the judicial foreclosure of mortgages. A state delegation of the power of the non-consensual sale of property, without providing the owner of the property with any procedural safeguards, is repugnant to the most basic notions of sovereignty, *Parks v. "Mr. Ford", supra* at 164

*"A political society, in the first place, puts this rude self-help under stringent regulation, and second, provides a substitute for it in the shape of judicial process. Self-help is indeed but an unsatisfactory means of redress. Its possibility depends upon the injured party being stronger than the wrongdoer, a state of things which is by no means a matter of course, and the party is made judge in his own cause, often at a time when he is least likely to form an impartial opinion upon its merits." Blackstone, *Commentaries on the Laws of England, supra,* at Book III, §5, pp. 1490-1491, n. 2 (Hammond), citing Pollock and Maitland, 2 *Hist. Eng. Law* (2d ed.), 574; 3 Holdsworth, *Hist. Eng. Law,* 243 ff.

n.2 (Hunter, J., concurring), and frustrates the very values which the Due Process Clause seeks to protect. *Washington v. Roberge,* 278 U.S. 116 (1928); *Eubanks v. Richmond,* 226 U.S. 137 (1912). *Cf. Eastlake v. Forest City Enterprises Inc.,* 96 S.Ct. 2358 (1976), *distinguishing Washington* and *Eubanks.*

This enormous power of sale delegated to warehousemen is far from, as defendants suggest, consumer oriented legislation. Compare, *Bond v. Dentzer, supra.* The statutory power of sale is not a substitute for other creditor remedies, but is "in addition to all other rights allowed by law to a creditor against his debtor." *N.Y. Uniform Commercial Code,* §7-210(7).* Absent section 7-210, no such power of sale would exist, and any sale by the warehouseman would render him liable for damages in conversion. Brown, *Personal Property,* §14.1, p. 446 (3d edition 1975).

Warehousemen obtained the power of summary sale in large part because they have "constituted, and still constitute special interest groups to which the state legislatures are traditionally responsive." Brown, *Personal Property,* §13.1, p. 391 (3d edition 1975).** The present

*Defendant Flagg Brothers is thus in error in suggesting at page 27 of its brief that a warehouseman may not obtain a deficiency judgment following sale. See 13 Carmody-Wait 2d, §§ 84:95, 84:104.n.10. In addition, the fact that the warehouseman has complete discretion as to whether to sell makes his remedy of sale broader than that of U.C.C. Article 9 creditor who must sell if the debtor has paid 60 percent of the cash price of loan. *N. Y. Uniform Commercial Code,* §9-505(1).

**No special duties were imposed upon the warehousemen in exchange for the power of sale. Unlike common carriers, warehousemen need not accept all customers. In addition, warehousemen are "only bound to ordinary care and diligence in the care and protection of the property entrusted to them." D. Overton, *A. Treatise on the Law of Liens,* §222, p. 256 (1883); *N. Y. Uniform Commercial Code,* §7-204.

power of sale stands in contrast to that earlier granted by some states which authorized the sale "only after a hearing in court and an order by the judge. . . ." Comment, *Liens—Extent to which Common-Law Artisan's Lien Has Been Supplanted by Statute,* 37 Mich.L.Rev. 273, 274 (1938). See description of statutes of Georgia, Kentucky, Maine, Massachusetts, Michigan, North Dakota, Rhode Island, South Dakota and Tennessee in 2 L. Jones, *A Treatise on the Law of Liens,* §§1052, 1053, 1054a, 1055, 1056, 1056a, 1059a, 1059b, 1060 (3d ed. 1914). In addition, "several of the statutes required a justice of the peace or sheriff to inventory the goods and conduct the sale." Brief of Petitioners American Warehousemen's Association and the International Association of Refrigerated Warehouses, p. 12; Brown, *Personal Property,* §119, p. 590 (2d edition 1955).

A statute which grants a class of creditors the power to summarily sell another person's goods in order to satisfy a disputed claim, without the necessity of instituting an action and proving the validity of the claim, and without even affording the owner of the goods an opportunity for a hearing, can hardly be said to be consumer oriented.*

The warehouseman's foreclosure of his lien is the functional equivalent of the ministerial functions performed by the clerks and sheriffs in *Sniadach, Fuentes and North Georgia Finishing. Parks v. "Mr. Ford",* 556 F.2d 132, 148 (3d Cir. 1977) (Adams, J., concurring); *Hall v. Garson,* 430 F.2d 430, 440 (5th Cir. 1970). *See McMeans v.*

*The statement in *Hackett v. Nelson Express and Storage Co.,* 162 Misc. 144, 294 N. Y. S. 905, 909 (Sup. Ct. 1937), that the statute "seeks to protect the person storing the goods" refers to the requirement of notice and advertisement which precedes the sale. The court did not state that the involuntary final sale of a person's goods is beneficial to the owner of the goods.

Schwartz, 330 F.Supp. 1397, 1399 (S.D. Ala. 1971) ("Federal jurisdiction should not depend on who served the writ of garnishment in the state court—the sheriff or the creditor's lawyer.")* This is made clear by Mr. Justice Stewart's description in *Fuentes v. Shevin, supra* of the state's role in the issuance of a writ of replevin:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." *Fuentes v. Shevin,* 407 U.S. 67, 93 (1972).

This description is fully applicable to the State's delegation to the warehouseman of the power to enforce his lien.

The critical question is not whether a state intends to circumvent constitutional guarantees by delegating its functions to private parties, but whether the function delegated is governmental in nature. A finding of no state action in the instant case may serve as a clear message to state legislatures that they will be able to insulate a variety of creditor remedies from the due process protections established by this Court in *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing,* by simply eliminating the ministerial functions of clerks or other officials.

*A finding of no state action in the instant case would create an ironic situation: "Those creditors who do resort to some form of judicial process are simultaneously found to have invoked state action because they used state officials—a court clerk and sheriff typically—and to have violated due process because they have not done enough. Meanwhile, creditors who resort to no judicial process whatsoever, and more flagrantly violate individual rights, are insulated from judicial review because no state action is found." Comment, ***State Action: A Pathology and a Proposed Cure,*** 64 Cal. L. Rev. 146, 176-177 (1976); McCall, ***Due Process and Consumer Protection Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues,*** 26 Hast. L. J. 383, 404 (1974).

It is thus clear that the State has delegated the public functions of non-consensual dispute resolution and lien enforcement to warehousemen. The warehouseman's power of sale is "so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966).

The State is also significantly involved in the contested activity because section 7-210 delegates to warehousemen an extraordinary power which they would not otherwise have, and authorizes them to engage in acts which the state could not itself engage in consistent with the Fourteenth Amendment. Moreover, by authorizing the summary sale of goods, section 7-210 has granted warehousemen a power which, from their standpoint, is an economically and strategically attractive alternative to either commencing an action for monetary damages, proving a claim and obtaining and enforcing a judgment, or obtaining judicial foreclosure on the lien, *N.Y.Lien Law,* §206, *et.seq.* New York has thereby "significantly encourag[ed]" the contested activity. *Reitman v. Mulkey,* 387 U.S. 369, 381 (1967); *Robinson v. Florida,* 378 U.S. 153 (1964); Clark and Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 Va.L.Rev. 355, 382 (1973).

Although the bailee's possessory lien has ancient roots dating back to the fifteenth century, *United States v. Toys of the World Club,* 288 F.2d 89, 94 (2d Cir. 1961) (Friendly, J.); 2 L. Jones, *The Law of Liens,* §731 (3d edition, 1914), the power to enforce this lien by summary sale did not come into existence until the enactment of statutes like the predecessors to section 7-210. The common law possessory lien is "merely a device to coerce the debtor into payment of his debts by the retention of his property from him until he pays. A sale by a lienor in attempted foreclosure of his lien is indeed, as to the owner of the goods, a conversion." Brown, *Personal Property,* §14.1, p.446 (3d edition 1975). In addition, in the instant case there is no contractual power of sale.* But for the contested statute, a warehouseman who sold a bailor's goods would be a converter and judicially decreed a forced purchaser. Prosser, *Law of Torts,* §15, pp.80-81, 87 (4th edition 1971). When a warehouseman sells goods to enforce his possessory lien, he is acting pursuant to, under, and only under color of section 7-210.

Defendants contend that a state command is necessary to find state action. This Court's decisions, however, show that state action is present where the statutory authorization constitutes the sole basis of authority for an act which, if performed by the state, would violate the Fourteenth Amendment. *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Evans v. Newton,* 382 U.S. 296, 305-311 (1966) (White, J., concurring); *Burton v. Wilmington Parkway Authority,* 365 U.S. 715, 726 (1961) (Stewart, J., concurring); *id.* at 727 (Frankfurter, J., dissenting); *id.* at 728 (Harlan and Whittaker, J.J., dissenting); *Railway Employees Dep't v. Hanson,* 351 U.S. 225 (1956); *Public Utilities Commission*

*This case is thus unlike a pledge or secured transaction where the right to retake or sell the collateral is conferred by contract. See Brown, *Personal Property,* §15.1, pp. 469-470 (3d edition 1975).

v. Pollak, 343 U.S. 451 (1952); *Nixon v. Condon,* 286 U.S. 73, 85 (1932); *McCabe v. Atchison,* 235 U.S. 151 (1914). *See also, CBS v. Democratic National Committee,* 412 U.S. 94, 178-180 (1973) (Brennan, and Marshall, J.J., dissenting); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 202-203 (1970) (Brennan, J., concurring in part and dissenting in part).

In the *Civil Rights Cases,* 109 U.S. 3 (1883), this court stressed the fact that the Fourteenth Amendment was designed to provide protection against unconstitutional state legislation. The Fourteenth Amendment "nullifies and makes void *all State legislation,* and State action of every kind" which conflicts with the Privileges and Immunities, Due Process and Equal Protection Clauses. *The Civil Rights Cases, supra* at 11 (emphasis added). "[T]he prohibitions of the amendment are against State laws and acts done under State authority." *Id.* at 13. "[T]he mischief and wrong which the amendment was intended to provide against . . . is State laws, *or* State action of some kind adverse to the rights of the citizen secured by the amendment." *Id.* at 13. The wrong must be "sanctioned in some way by the State", or "done under state authority." *Id.* at 17. The wrong must rest "upon some State law or State authority for its excuse and perpetration." *Id.* at 18.*

*This is consistent with the language of the Fourteenth Amendment itself. The Amendment begins: "no state shall *make or enforce any law. . . .*" This language directly precedes the Privileges and Immunities Clause. The language preceding the Due Process Clause—"*nor* shall any state deprive any person . . ."—does not indicate a more restrictive scope of protection against state action than is provided by the Privileges and Immunities Clause. The use of the word "nor" indicates that the same state action requirement applies to both clauses. This Court in *The Civil Rights Cases* indicated that the same state action requirement applies to both clauses. *The Civil Rights Cases, supra* at 11.

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), four Justices agreed that specific statutory authorization for the contested discrimination by itself constituted state action. Mr. Justice Stewart, concurring, stated that "[t]he highest Court of Delaware has . . . construed this legislative enactment as authorizing discriminatory classifications based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." *Burton v. Wilmington Parking Authority, supra* at 726-729. Justice Stewart found that the specific statutory authorization granting the restauranteur the power to deny service to blacks constituted significant state action.

Justices Harlan, Whittaker and Frankfurter agreed that if the state statute had been construed by the highest court in Delaware to specifically authorize the discriminatory conduct, this would clearly support a finding of state action. Mr. Justice Harlan, in an opiinon joined by Mr. Justice Whittaker, stated that if the statute were so construed, he "would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment." *Id.* at 729. (Harlan and Whittaker, JJ., dissenting). Mr. Justice Frankfurter agreed that if Justice Stewart was "correct in so reading the decision of the Delaware Supreme Court, his conclusion [regarding state action] inevitably follows." *Id.* at 730 (Frankfurter, J., dissenting).*

*Justices Harlan and Frankfurter dissented only because they concluded that the construction given to the statute by the Delaware Supreme Court was unclear, and that the action should be remanded to that Court for clarification of the meaning of the statute.

In *McCabe v. Atchison,* 235 U.S. 151, 162 (1914), this Court stated that if an individual is discriminated against on the basis of race "by a common carrier, acting in the matter under the authority of a state law . . . he may properly complain that his constitutional privilege has been invaded." While the case was resolved on procedural grounds, not one Justice expressed disagreement with this language in the Court's decision. Moreover, this Court in *Reitman v. Mulkey* explained the decision in *McCabe* as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." *Id.* at 379.

In *Evans v. Newton,* 382 U.S. 296 (1966), Mr. Justice White concluded that specific statutory authorization to engage in conduct offensive to the Fourteenth Amendment constitutes state action particularly where, as in the instant case, the statute "depart[s] from a policy of strict neutrality" by reversing the common law, and constitutes the sole basis of authority to perform other an unlawful act. *Id.* at 305-307 (White, J., concurring). Similarly, in *Nixon v. Condon,* 286 U.S. 73, 85 (1932), the Court found that the state's statutory conferral of a power which that the state itself could not itself constitutionally exercise under the Fourteenth Amendment is highly significant for state action purposes. "If the state had not conferred it, there would be hardly color of right to give basis for its exercise." In *Reitman v. Mulkey,* 387 U.S. 369 (1967), this Court made it clear that state action was found in *Nixon v. Condon, supra* because a state statute conferred on the committee "authority which the committee otherwise might not have had," even though the statute contained "no directions with respect to the exercise of that power." *Reitman v. Mulkey, supra* at 379. The exercise of the power in *Nixon* was considered to be "an expressed of state au-

thority contrary to the Fourteenth Amendment." *Reitman v. Mulkey, supra* at 379. And, in *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952), this Court held that the Commission's approval of the contested activity, by simply dismissing an investigation to determine its legality, was sufficient to constitute government action.

This Court's decision in *Moose Lodge No. 107, v. Irvis,* 407 U.S. 163 (1972) makes it clear that a state command that the private party perform a particular act is not a prerequisite for a finding of state action. In *Moose Lodge,* this Court held that the Liquor Control Board's regulation, which required licensed clubs to "adhere to all of the provisions of its Constitution and By-Laws", constituted state action because its effect was "to place state sanctions behind [the club's] discriminatory membership rules. . . ." *Id.* at 177-178. State action was found even though the Board's regulation was "neutral" and did not require the club to adopt or enforce any particular regulation. The initiative for any particular regulation or policy came solely from the private club and not from the Board, and the Board did not take any view of what regulations or policy the club should adopt. In this sense, the state's involvement in the instant case is more significant than in *Moose Lodge.* While the Board in *Moose Lodge* did not set forth its policy with respect to discriminatory practices, but simply required the club to enforce whatever policy it chose to adopt, New York, in authorizing the summary sale of goods by warehousemen, has expressly sanctioned and approved the particular conduct that plaintiffs challenge.

Defendant Flagg's reliance on *Evans v. Abney,* 396 U.S. 435 (1970) is misplaced. Most of that opinion does not deal with state action, but is premised on the fact that the decision of the Georgia Supreme Court, pursuant

to which the property reverted to the testator's heirs, constituted state judicial action that did not violate the Equal Protection Clause. That part of the Court's decision which holds that the making of the will did not constitute state action is based on the fact that the testator had made it clear that he had not relied upon the Georgia trust statute:

> "Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. (citation omitted). On the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own full blown social philosophy." *Evans v. Abney, supra* at 445.

In the instant case, since a sale of goods by the warehousemen would, absent statutory authority, be an unlawful act, there is no question that warehousemen "act with the knowledge of and pursuant to that statute." *Adickes v. S.H. Kress and Co., supra* at 162 n. 23. Compare *Lucas v. Wisconsin Electric Power Co.,* 466 F.2d 638, 656 (7th Cir. 1972) *(en banc), cert. denied,* 409 U.S. 1114 (1973), where the court stated that a "different question" would have been presented had the utility terminated service pursuant to statutory authority.

In *Jackson v. Metropolitan Edison, Co., supra,* this Court held that Metropolitan Edison's termination of utility service did not constitute state action because Pennsylvania was not involved or concerned with the contested activity. Pennsylvania had not delegated a governmental function and had not specifically authorized or encouraged the summary termination of utility service. The "initiative" for the utility shut-off policy came from the utility company which had filed its tariff with the Com-

mission. The Commission did not act on this tariff. It had "never been the subject of a hearing or other scrutiny by the Commission." *Jackson v. Metropolitan Edison Co., supra* at 354. Moreover, it was "less than clear under state law that Metropolitan was even required to file this provision [providing for utility shut offs] or that the Commission would have had the power to disapprove it." *Id.* at 355. In addition, the utility had the right to terminate service at common law. *Id.* at 354 n. 11.

Here, by contrast, there is a direct nexus between the State conduct and the contested activity. New York, unlike Pennsylvania, has by statute expressly delegated governmental power to the private sector. The New York legislature, unlike the totally passive non-involvement of the Public Service Commission in *Jackson,* took the initiative by enacting the contested statute. In so doing, it specifically authorized warehousemen to summarily sell a bailor's goods. This power, unlike the power to terminate utility service in Pennsylvania, did not exist at common law. Thus, unlike *Jackson,* the State has placed its "imprimatur" on the contested conduct. *Jackson v. Metropolitan Edison Co., supra* at 357.

New York has specifically delegated to warehousemen the power to summarily sell another's property—an act which if performed by the State would violate the Fourteenth Amendment's command that the state not deprive a person of property without due process of law. *North Georgia Finishing Inc., v. Di Chem Inc., supra; Mitchell v. W.T. Grant Co., supra; Fuentes v. Shevin, supra; Sniadach v. Family Finance Corp., supra.* This Court's decisions support the conclusion that this specific statutory authorization and encouragement constitute state action.

Moreover, New York has delegated to warehousemen the governmental functions of lien enforcement and non-consensual, final dispute resolution. This delegation of public power clearly constitutes state action.

A finding of state action will allow the courts to balance the competing interests to determine the procedure required by the Due Process Clause. It will not deprive the warehouseman of his lien or of the means to enforce it. It will only insure that an owner of property will be afforded some opportunity to be heard before his goods are sold.

Conclusion.

For the foregoing reasons, the judgment of the court below should in all respects be affirmed.

Dated: December 20, 1977,
White Plains, New York.

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In The

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

-and-

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-and-

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

-and-

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR PETITIONERS FLAGG BROTHERS, INC., and HENRY FLAGG

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In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., etc., *et al.*,
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and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,
Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS FLAGG BROTHERS, INC. and HENRY FLAGG

INTRODUCTORY STATEMENT

Petitioners, FLAGG BROTHERS, INC. and HENRY FLAGG, submit this brief in reply to the brief for respondents.

ARGUMENT

I.

THE CASES RELIED UPON BY RESPONDENTS DO NOT SUPPORT THEIR POSITION THAT STATE ACTION EXISTS IN A WAREHOUSEMAN'S LIEN SALE.

A. *Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir., April 4, 1977).

Respondents' strong reliance upon *Parks* is misplaced. Contrary to repondents' assertion that the sale provision of the Pennsylvania garageman's lien law is a statute "virtually identical to the contested statute herein" (Brief for Respondents at 17, n.), the differences between the statutes are significant and compelling. The Pennsylvania statute entwines the Commonwealth jointly in concert with the garageman in performing acts authorized under the statutory scheme. There is no mistaking the "imprimatur" of the state upon the conduct of the private party because there is not only active participation by the state but the accrual of a monetary benefit to the state as a direct result of the challenged activity.

The Pennsylvania statute provides that:

1. The sale takes place "in the same manner as personal property is sold by sheriff or constable." Pa. Stat. Ann. Tit. 6, §12 (1963).

2. The sale is "as conclusive to the title conveyed as if sold by a sheriff or constable." Pa. Stat. Ann. Tit. 6, §14.

3. The sale proceeds which exceed the amount of the lien and expenses if not demanded within six months after date of the sale *must be deposited* with the county treasurer *and credited* to the general revenue fund of the county. The owner may reclaim within three years of the date of deposit. Pa. Stat. Ann. Tit. 6, §13.

In addition to the statutory requirements the State Motor Vehicle Bureau upon application of the foreclosing garageman issues a certificate of title in the name of the lien holder (see the concurring opinion of Gibbons, J., in *Parks* at 158).

State participation and command set forth in the Pennsylvania statute is in sharp contrast to the absence of a state official and the permissiveness set forth in N.Y.U.C.C. §7-210. Pennsylvania directs a garageman to follow sales procedures of a sheriff. N.Y.U.C.C. §7-210 does not.[1] Pennsylvania decrees the effect of the sale to be as conclusive as a sheriff's sale; N.Y.U.C.C. §7-210 does not.[2] Pennsylvania bestows a direct pecuniary benefit upon the state by commanding deposit of an overage realized upon the sale if demand is not made by the owner within 6 months, thus giving

---

1. The warehouseman's lien foreclosure statute imposes at least five procedural steps of which not one finds its counterpart in a sheriff's execution under Article 52 of the N.Y.C.P.L.R.: (1) advance notice to the depositor in a manner reasonably calculated to assure that notice will be actual. *Cf. Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950); (2) a minimum 26-day waiting period between notice and sale; (3) sale at a specified place; (4) advertisement of the sale by newspaper publication; (5) requirements as to how the sale may be conducted and to whom, indicating the warehouseman is a fiduciary agent for the depositor to protect the latter's equity, *Milford Packing Co. v. Isaacs*, 90 A.2d 796 (Del. Super. Ct. 1952). This is unlike a sheriff who is the agent throughout, and, as necessary, the strong right arm of the government, for the creditor party.

2. Under N.Y.U.C.C. §7-210(5) if the warehouseman sells in bad faith to other than a bona fide purchaser the sale is not final as to the depositor and he may replevy his property. *See* C.P.L.R. §§7101 *et seq.*

the county the use of that money for 3 years and ownership thereafter if the owner does not claim the money within 3 years; N.Y.U.C.C. §7-210 does not have any such provisions.[3] Pennsylvania was thus in a "symbiotic relationship" with the garageman since it could derive a benefit from the sale of the vehicle, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The commands of the sale provision of Pennsylvania garageman's lien law plus the active participation by the State Motor Vehicle Bureau in the final act of divesting title of the owner and placing title in the name of the garageman render the *Parks* case totally different than the case at bar. Respondents' claim that *Parks* supports their position is without foundation.

In closing out the discussion of *Parks* it should be noted that the Pennsylvania garageman's lien sale provision when measured in a due process sense fails to approach the safeguards of N.Y.U.C.C. §7-210.

N.Y.U.C.C. §7-210(2)(b) requires notification in person or by registered or certified letter; the Pennsylvania statute merely

3. In fact there is authority that §7-210 prohibits a warehouseman from selling more goods than necessary to satisfy his lien, any incidental overage to be held by the warehouseman. 93 C.J.S., "Warehousemen" §69 at 506; *Jesurun v. Kent*, 47 N.W. 784 (Minn. Sup. Ct. 1891); N.Y.U.C.C. §7-210(6).

The depositor can always sue to enjoin a sale using routine civil procedure. C.P.L.R. §§6301 *et seq.*; 12 Carmody Wait 2d, "Injunctions" §§78:27, 49 (1966); Brief of proposed Amicus Curiae New York State Consumer Protection Board, at 7 (citing *Knox v. DeCarolis Moving and Carting Co.*, No. 8941/75 (Sup. Ct. Monroe Cty. 1975), in which a preliminary injunction issued to enjoin a sale). As to the contention that issuance of preliminary injunctions are conditioned upon posting bond and that judgment bonds cost money, *see* C.P.L.R. §1101(a); N.Y. City Civ. Ct. Act §2102, Uniform City Ct. Act §2102, in 29A, pt. 3 McKinney's Con. L. of N.Y. Ann., "Judiciary" 275-76 and pocket supp. 1977-78 at 224 (*in forma pauperis* provisions allowing litigant to have the costs, fees and expenses necessary to prosecute an action waived).

requires notice in writing (Pa. Stat. Ann. Tit. 6, §11). N.Y.U.C.C. §7-210(2)(e) requires the sale to be held at the nearest suitable place to where the goods are stored; the Pennsylvania statute does not qualify in any way the place of sale. N.Y.U.C.C. §7-210(9) provides liability for damages or conversion liability for failure to comply with sale requirements; the Pennsylvania statute does not. *See Grafstein v. A. Santini Storage Co.*, ___ Misc. ___, 26 N.Y.S.2d 125 (N.Y. City Ct., N.Y. Cty.), *aff'd*, 180 Misc. 673, 42 N.Y.S.2d 496 (App. T. 1st Dept. 1941), *see also*, N.Y.U.C.C. §7-204(2).

Parks and the Pennsylvania garagemen's lien law cannot be the measuring rod of N.Y.U.C.C. §7-210 for state action or due process purposes.

B. *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170 (1973).

Respondents' reliance upon *Blye* for the proposition that the law of New York recognizes the enforcement of a lien by sale as a traditional function of the sheriff is incorrect. The enforcement by sale was not in issue (N.Y. Lien Law §200). The lien of the innkeeper arising from his seizure of the guest's belongings was declared to be state action (N.Y. Lien Law §181). The sale provision of the New York Lien Law was not before the New York Court of Appeals and was not addressed in its decision. It is clear that the concern of the New York Court was directed toward the seizure:

> ". . . we note that plaintiff's property was not *seized* by a State official, but by private persons — i.e., hotel personnel, acting pursuant to State law. The threshold question is, therefore, whether the requisite 'State Action' is present."

Blye, supra, 33 N.Y.2d at 19, 347 N.Y.S.2d at 174. (Emphasis added.)

Lien enforcement insofar as it relates to a sheriff's function is comprised of two elements, first the seizure and ancillary to that the sale. In characterizing "execution of a lien" as the function of a sheriff the court was only concerned with the seizure aspect and not sale. Of the three types of civil enforcement procedures mentioned by the New York Court of Appeals, two of them, prejudgment attachment of property, C.P.L.R. Art. 62, and provisional replevin under the same Art. 62, do not involve a sale or other liquidation of property, but only its seizure and detention pendente lite. See C.P.L.R. §§314(3), 5230(a), 6201, subds. 1 and 2; N.Y. Lien L. §207. Moreover, *Blye* erroneously relies upon *Classic v. United States,* 313 U.S. 299 (1941) which did not involve "state action" and which only held that official conduct in abuse of statutory authority is conduct taken "under color of" state law. *Cf. Monroe v. Pape,* 365 U.S. 167 (1961).

The Supreme Court is not bound to the *Blye* characterization to any degree, and deferral thereto would be singularly inappropriate in this case. It is a basic rule of federal-state comity that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism," state decisions upon a federal common law question are not conclusive and the substantive law ultimately governing is case law interpretation fashioned by federal courts. *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 and n. 6 (1972); *Textile Workers' Union v. Lincoln Mills,* 353 U.S. 448, 456-57 (1957).

The need for a uniform rule of decision as to whether a warehouseman's lien sale is equivalent to a function of sovereignty, is aptly illustrated by the conflicting decisions in the Eighth and Ninth Circuits on this precise issue. *Compare Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.,* 354 F.2d 356 (8th Cir. May 12, 1977) (public function in North Dakota, hence state action) *with Melara v. Kennedy,* 541 F.2d 802 (9th Cir. 1976) (not a public function, in California, state action not found). With federal and state courts

increasingly relying upon the public function analysis of state action in the area of creditor remedies as dispositive of the threshold issue of the applicability of the Fourteenth Amendment, *see Parks v. "Mr. Ford", supra,* 556 F.2d at 138-142; *Sharrock v. Dell Buick-Cadillac, Inc.,* 56 A.D.2d 446, 393 N.Y.S.2d 166 (2d Dept. March 28, 1977), the need becomes overriding for a uniform interpretation of "function of sovereignty" in place of present state-by-state analysis, whereby each debtor's constitutional rights devole ultimately upon the fortuity of the debtor's state of residence.

The Supreme Court is only bound by a state court decision on questions of local law that avoids, rather than raises, a constitutional issue. *Zwickler v. Koota,* 389 U.S. 241, 248-49 (1967); *Chicago v. Fieldcrest Diaries,* 316 U.S. 168 (1942); *Juidice v. Vail,* ____U.S.____, 51 L.Ed.2d 376, 391 (March 22, 1977) (Stewart, J., dissenting).

Respondents' reliance upon *Reitman v. Mulkey,* 387 U.S. 369 (1967), for this Court's deferral to *Blye* is misplaced. The rule of *Reitman* is that the state involves itself in private racial discrimination in housing by giving it a preferred status through a state constitutional amendment that wipes out fair housing laws and bars minorities from obtaining redress for discrimination and from the political processes through which to obtain a change in the law. *Evans v. Abney,* 396 U.S. 435, 457 (1970) (Brennan J., dissenting); *Davis v. Richmond,* 512 F.2d 201, 203 n. 4 (1st Cir. 1975).[4] This limited holding was compelled by the history, objectives and effects of California's State

4. This same intrusion of governmental power and prestige backing authorized private conduct by the repeal of inconsistent laws, leaving aggrieved parties no alternatives or remedies against the authorized activity, distinguishes the enactment of N.Y.U.C.C. §7-210 from the Railway Labor Act amendment upheld in *Railway Employees' Dept. v. Hanson,* 351 U.S. 225 (1956). *See Davis v. Richmond, supra,* 512 F.2d at 203 n.4. For the requirement of state "power property and prestige" supporting ostensibly private activities, *see Gilmore v. City of Montgomery,* 417 U.S. 556, 574 (1974).

constitutional amendment which the California Supreme Court had undertaken to examine, "armed as it was with the knowledge of the facts and circumstances." *Reitman v. Mulkey, supra,* 387 U.S. at 378. Hence, the Supreme Court determined that it was unnecessary to reassess these matters, although it acknowledged twice that it had "frequently undertaken" such judgments itself, and also because it was a provision of the California Constitution that was construed, as opposed to a statute. Neither reason for the Supreme Court's deferral in *Reitman* is present in the New York Court of Appeals' superficial one-paragraph examination of the innkeeper's lien law in *Blye.*

C. *Civil Rights Cases,* 109 U.S. 3 (1883).

In the Civil Rights cases the Supreme Court held that Congress had exceeded its power in enacting a statute under the Fourteenth Amendment providing civil and criminal redress against owners of inns and hotels, theaters and railroad companies for denying Negroes full and equal enjoyment of such accommodations, guaranteed to them under the statute. The Supreme Court has never interpreted this case as holding state legislative action in conferring an individual right arguably in violation of another individual's constitutional right to be sufficient state action for purposes of the Fourteenth Amendment and §1983. More fundamentally, the passage of a statute allowing a private party to deny due process to another private party does not violate the latter's due process right because that right is only assertable against the actions of the state. The enactment would implicate the state only if it authorized the state acting through any of its officials,[5] or

5. It is not just the mere participation of minor government officials that supplied the requisite state involvement in the Supreme Court's quartet of economic due process cases cited by respondents, but the fact that the creditors there invoked the governmental procedures of court processes to assist them in their collection efforts, not relying on "self-help." *Fuentes v. Shevin,* 407 U.S. 67, 79 n. 12 (1972) makes clear that the Fourteenth Amendment applied because self-help did not and that state action and self-help are indeed mutually exclusive concepts.

through any "arrangement, management, funds or property," *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970), *Burton v. Wilmington Packing Authority,* 365 U.S. 715, 722 (1961), not to accord due process in its dealing with private individuals. Limitation upon the federal government's reach should not be read out of the Constitution:

> "We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the (necessary and proper) clause of (Art. I, §8), and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

Fairbank v. United States, 181 U.S. 283, 288-89 (1901).[6]

II.

A WAREHOUSEMAN'S RIGHT OF SALE PURSUANT TO N.Y.U.C.C. §7-210 IS NOT A FUNCTION OF SOVEREIGNTY WITHIN THE MEANING OF *JACKSON V. METROPOLITAN EDISON COMPANY*, 419 U.S. 345 (1974).

A. Neither in procedure nor effect is a warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 equivalent to the function performed by a sheriff in New York State executing upon a judgment.

Respondents cite common law authorities in support of their characterization of N.Y.U.C.C. §7-210 as permitting a warehouseman to do that which, were it not for the statute, the sheriff would have to do in order for the warehouseman to collect his charges from a defaulting depositor. Careful analysis of the relevant facts and circumstances, however, clearly shows that neither in procedure nor effect is a warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 equivalent to the function performed by a sheriff in New York State in executing upon a debt reduced to judgment.

Under Article 52 of the New York Civil Practice Law and Rules governing enforcement of money judgments, the sheriff performs the following steps: (1) receives an execution from an authorized officer or court clerk directing him to satisfy the judgment out of the debtor's real or personal property, §5230(b); (2) "levies" upon the debtor's personal property, upon property

6. To the extent the Court reads *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914), to hold that passage of a permissive law might constitute *ipso facto* sufficient state involvement, petitioners point out that this case is distinguishable as involving race discrimination.

not capable of delivery by serving a copy of the execution, §5232(a), upon property capable of delivery by seizing it and taking it into custody, §5232(b); (3) holds the seized property in impound, pending sale; (4) sells the property, §5233; (5) makes return of execution showing the extent of the judgment's satisfaction, §5230(c), (d).

In contrast, only one of the above steps, the actual sale itself, is comparable to what the warehouseman does under N.Y.U.C.C. §7-210. Steps (l) to (3) of the sheriff's procedure are not involved, since the warehouseman already has possession voluntarily conveyed to him under the bailment agreement. The warehouseman does not need to resort to seizure, unlike a landlord under a distress for rent statute or a repossessing secured creditor under Article 9 of the Uniform Commercial Code.[7] Moreover, the warehouseman's lien foreclosure statute imposes at least five procedural steps of which not one finds it counterpart in the sheriff's execution. *See* Point I, *supra*, n. l.

Thus, the only procedural similarity between a sheriff's sale and a warehouseman's lien foreclosure sale is the tautological fact that both involve sales. Since at least *Evans v. Newton*, however, it has been constitutional law that the mere fact that a private party performs a function duplicated by state government is not state action:

> "The range of governmental activities is broad and varied, and the fact that government has

7. Under distress for rent in England, sale is a private remedy not available to the government to collect taxes or local assessments. 13 Halsbury's Laws of England, "Distress", §§ 291, 309-310, 333-341, 397-421, 434-441 (4th Ed. 1975). The private right of summary sale of distrained personalty has existed in England by statute since the Distress for Rent Act of 1689. 2 Wm. & Mary, Second Sess., Ch. V (1689).

> engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Evans v. Newton*, 382 U.S. 296, 300 (1966).

In a very realistic sense, the argument for state action herein is weaker than the performance of duplicating public functions that the Supreme Court laid to rest in *Evans v. Newton*. Above and beyond the procedural differences already indicated, there is a greater dissimilarity between sheriff's sales and warehouseman's sales which demonstrates that the two types of sales are not duplicative. The specific lien sale procedure under attack is Subdivision 2 of N.Y.U.C.C. §7-210, applicable to household goods. U.C.C. Official Comment 1. Household goods warehousemen such as petitioners have been allowed to sell household goods to satisfy their storage charges since at least 1879 (Brief for Petitioners, at 8-11). The same cannot be said for the sheriff. Whatever can be generalized about the function of the sheriff to enforce liens in New York, it is a fact that since at least 1842 the sheriff has not been permitted to levy upon and sell "household furniture" in satisfaction of a judgment lien. *See* Ch. 157 (1842) N.Y. Laws 193.[8] This is pursuant to the New York statutes exempting personal property from satisfaction of money judgments, which the Supreme Court took cognizance of as recently as *United States v. Kras*, 409 U.S. 434, 438, 495 n. 6 (1973).

Thus, far from being a traditionally exclusive governmental function, or even a function duplicative of the sheriff, a warehouseman's right to sell another's household goods to

8. This early exemption statute was replaced by Ch. 448, §§1390, 1391 and 1392 (1876) N.Y. Laws 269-270 and by Ch. 416 (1877) N.Y. Laws which recodified the exemption law within the Code of Civil Procedure, assuming its present form. See C.P.L.R. §5205(a).

satisfy a debt is a function that only a warehouseman has been able to perform.[9] *See Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976); *accord, Smith v. Bekins Moving and Storage Co.*, 384 F. Supp. 1261 (E.D.Pa. 1974). In the last analysis, the household goods warehouseman's right of summary sale is an exclusive function of household goods warehousing, not of sovereignty. *Cf. Parks v. "Mr. Ford", supra*, 536 F.2d at 139.

Blackstone in his Commentaries lists six forms of self-help available to a private party at common law. At least four of them involve a seizure and/or detention and at least as many require entry upon the debtor's land. Blackstone, *Commentaries on the Laws of England*, Book III, §§7-12 (Jones Ed.). These are all analogous to private possessory liens consistently upheld as not involving state action, *Parks v. "Mr. Ford", supra; Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974), and to repossession under Article 9 of the U.C.C. also consistently upheld, *Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir.), *cert. denied sub nom. Gibbs v. Carver*, 419 U.S. 1039 (1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Adams v. Southern Calif. First Nat'l Bank*, 419 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). *A fortiorari*, if these private remedies, which more closely resemble the sheriff's characteristic function as the strong right arm of government, are not considered state action, then analytically neither is a private sales remedy which bears even less resemblance than possessory remedies to a sheriff's function. Stated another way, if sale by a warehouseman is state action as the delegation of a sheriff's function, then so must be all distress and detainer remedies authorized at law, all private rights of self-defense, citizen's arrest, and the utility cut-off upheld in *Jackson v. Metropolitan*

9. If the warehouseman's right of sale is struck down, then the warehouseman could not collect his charges from the stored goods, since the sheriff could not levy upon the goods in storage to satisfy a judgment. This would be especially detrimental if the storage lot is abandoned and cannot be liquidated to make room for new accounts.

Edison Co., supra, all more sheriff-like in their procedures and in their drastic finality than a warehouseman's sale.[10] To paraphrase Mr. Justice Douglas, concurring in *Boddie v. Connecticut,* 401 U.S. 371, 383, 385 (1971): "I do not see the length of the road we must follow if we accept (respondents') invitation."

B. A warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 is not a form of binding conflict resolution.

1. The exclusivity element is missing.

Petitioners in their initial brief took issue with the Second Circuit's characterization of the warehouseman's right of sale as a delegation of the sovereign function of "binding conflict resolution," a concept to which the Supreme Court gave controlling expression in *Boddie v. Connecticut,* 401 U.S. 371 (1971). Petitioners contend that the "exclusivity" element stressed in *Boddie* was crucial to that case and rendered its holding and rationale inapplicable to the resolution of creditor-debtor disputes.

Petitioners' reliance upon nonexclusivity of state control over warehouseman-depositor disputes as a controlling distinction between *Boddie* and *Jackson* is reinforced by the Supreme Court's decision in *United States v. Kras,* 409 U.S. 434 (1973), holding that the federal bankruptcy court's refusal to discharge an indigent voluntary bankrupt for inability to pay the bankruptcy court fees does not violate the bankrupt's due process or equal protection rights. *Boddie* was distinguished as a

10. As stated in Point I above, if the warehouseman sells in bad faith to one other than a bona fide purchaser, then the sale is not final as to the depositor and he may replevy his property. And see n.2 above on statutory procedures codifying the depositor's common law remedies, which did not include replevy from a third party purchaser. 2 F. Pollack and F. Maitland, *A History of English Law* 169-179 (2d ed. 1959).

narrow ruling that rested upon the exclusivity of access to court as the sole means of dissolving marriage and preserving associational interests, as opposed to the government's non-exclusive control over the dissolution of debts. "However unrealistic," it might seem, the Court said, a distressed debtor does have other remedies to choose from besides resort to court, specifically mentioning negotiating an agreement with his creditors or entering other private arrangements.

Respondents attempt to meet the exclusivity element of a "binding conflict resolution" characterization, manifestly not present in the commercial transactions area, by asserting state monopolization of the various nonconsensual forms of conflict resolution, one of which, assertedly, forced sale, has been delegated to the warehouseman through N.Y.U.C.C. §7-210 (Brief for Respondents at 27-28). Adding nonconsensuality into the picture, however, only befuddles the issue without supplying the missing exclusivity.

For example, compulsory arbitration is common in New York, both under law[11] and as a result of enforcement of arbitration clauses in contracts which one side refuses to honor. *See* N.Y.C.P.L.R. §7501; *comp.* 9 U.S.C.A. §§1 *et seq.* (Federal Arbitration Act, 61 Stat. 669 (1947)); *see also A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co.,* 25 N.Y.2d 576, 307 N.Y.S.2d 660 (1970), *cert. denied,* 398 U.S. 939. If a reneging party is forced to arbitrate by a court order enforcing the arbitration agreement, then, according to respondents, the arbitration is no longer private but becomes a species of state

11. *E.g.,* Ch. 892, §12 (1977) N.Y. Laws, eff. 12/1/77 (amending New York Comprehensive Automobile Insurance Reparations Act (No Fault Law), N.Y. Insurance Law §§670 *et seq.,* to require mandatory arbitration of disputes between motor vehicle insurance carriers concerning their relative responsibility to pay first-party benefits). *See also* N.Y. Judiciary Law §213, subd. 10 (McKinney, main vol. at 453 and pocket supp. 1977-78 at 94) (describing system of compulsory arbitration of claims for money only up to $6,000, to be promulgated by court rule).

action in the form of binding, nonconsensual conflict resolution, giving rise to a potential due process right of the reneging party to judicial control over the dispute's resolution. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). The injection of the nonconsensuality element cancels out the arbitration agreement.

There are further anomalies. N.Y.C.P.L.R. §4522 denies admissibility into evidence of a printed contract covering a consumer transaction containing an arbitration clause where the print is in less than eight-point type.[12] The parties would not be legally bound by an agreement in lesser type and in such event the warehouseman's resort to summary sale would be construed as nonconsensual, and a function of sovereignty subject to due process strictures. The application of the Constitution, thus, would turn on the nicety of the size of print of an agreement to arbitrate. The Due Process Clause was not meant to draw such fine lines. *North Georgia Finishing Co., Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *comp. Brooks v. Flagg Bros., Inc.*, 554 F.2d 764 (April 7, 1977), *cert. granted*, ___ U.S. ___, 46 U.S.L.W. 3215 (Oct. 4, 1977) (A159a, 165a and n.3).

Normally, a moving and storage contract and warehouse receipt contain provisions for a lien and sale to satisfy unpaid charges (A109a-111a, 113a-114a).[13] In the absence of an express agreement, it is well settled in New York that a statute that

12. This plainly consumer-oriented statute refutes the amici's imputation of an anti-consumer bias to New York's legislature. *See also* Ch. 747 (1977) N.Y. Laws 1215 (Eff. June 1, 1978) (plain language law). In the absence of such a policy or state-enforced custom, cases such as *Robinson v. Florida*, 378 U.S. 153 (1963), have no application to the state action question.

13. These provisions are:

> Contract: "2. PAYMENT: Storage payments are due and payable monthly in advance. . . . The company has a lien on all goods moved or stored to secure payment for charges for all services rendered. . . ."

(Cont'd)

affects a contractual relationship is as much a part of the parties' express undertaking as though it were spelled out in writing. *Dolman v. United States Trust Co.*, 2 N.Y.2d 110, 116, 130 N.E.2d 764, 157 N.Y.S.2d 539, 541-42 (1956); *Strauss v. The Union Central Life Ins. Co.*, 170 N.Y. 349, 356, 63 N.E. 347 (1902); 10 N.Y. Juris., "Contracts" §204. This implied contract term doctrine is a legal fiction, but it is just as much a fiction to infer actual consent of the average depositor of household goods to the extrajudicial sale of the deposited goods from the fact that provisions for sale are expressly contained in the storage agreement. *See Melara v. Kennedy, supra* (Choy, J., dissenting).

2. The requirement of an impartial third-party judge is missing.

One of the purposes of the sovereign is to resolve disputes between its subjects:

> ". . . In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens."

(Cont'd)

> *Warehouse Receipt:* "2. PAYMENT (a): It is agreed that the company shall have a general lien upon any and all property deposited with it. . . . All goods deposited upon which storage and all other charges are not paid when due will be sold at public auction to pay said accrued charges. . . ."

J. Locke, *Two Treatises of Government* par. 125, in P. Hastell (Ed.) (Cambridge: The University Press 1960) at 369. (Emphasis is in translation edition.)

Locke's emphasis upon an "indifferent" judge resolving disputes, which he repeats later in the tract, *id.*, at 371, is deliberate, and reveals an inherent fallacy of the "binding conflict resolution" theory of state action in this case. *See* F. Pollack, *Essays on the Law* 94 (1922). The function of sovereignty is to resolve disputes impartially through an "indifferent Judge,", *i.e.*, one not having a vested interest in the outcome. That function cannot be delegated to one of the parties to a dispute, for it would destroy a necessary element characterizing the function as governmental: the impartiality of the dispute-resolver.

3. A warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not an exercise of a function of sovereignty.

The Third Circuit in *Parks* listed the public functions which the Supreme Court has associated with the traditional exercise of sovereignty, including eminent domain, *Jackson v. Metropolitan Edison Co., supra,* power to control the electoral process, *Nixon v. Condon,* 286 U.S. 73 (1932); regulation of streets and sidewalks, *Marsh v. Alabama,* 326 U.S. 501 (1946) and maintenance of public parks, *Evans v. Newton, supra; Parks v. "Mr. Ford", supra,* 556 F.2d at 139. To this list of distinctly governmental powers may be added the formation and dissolution of marriage, *Boddie v. Connecticut, supra,* the police power to make rules, regulations or findings to facilitate the administration of the law or to protect the general health, safety and welfare of the public, *East New York Savings Bank v. Hahn,* 326 U.S. 230, 232 (1945).[14]

14. *See also* enumeration found in the "Statutes" chapter of McKinney's Con. L. of N.Y. Ann. (West 1971) at §3, pp. 26-28: granting franchises, enacting local laws, enacting zoning ordinances, controlling public utility rates, regulation and control of alcoholic beverages, granting and resolving trade and professional licenses, *see* N.Y. Edu. L. Tit. VIII (McKinney 1972).

The Third Circuit held in *Parks* that all these functions, however they may be defined, are qualitatively different from the exercise by a garageman of a possessory lien securing his charges. No less is true of a right of sale to secure a creditor's charges such as the warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210.

The State of New York has no obligation to resolve creditor-debtor disputes, in light of the traditionally private dispute-resolving alternatives available, *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 353; *United States v. Kras, supra,* 409 U.S. at 445; E. Johnson, V. Kantor and E. Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (National Center for State Courts 1977). Nor can it be said that, in the mind of the ordinary citizen, the auction sale of encumbered belongings is traditionally identified with the state, the same as the calling out of the state militia to quell a riot. *Gilmore v. City of Montgomery, supra,* 417 U.S. at 582 (White, J., concurring); *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 365, 371 (Marshall, J., dissenting); N.Y.Const. Art. 4, §3; *Grafton v. Brooklyn Law School,* 478 F.2d 1137, 1143 (1973).

SUMMARY AND CONCLUSION

A careful sifting and weighing of the facts and circumstances of this case leads inevitably to the conclusion that the warehouseman exercising his right of sale under N.Y.U.C.C. §7-210 (1) is not performing a traditional function of the sheriff, (2) is not engaged in binding conflict resolution, (3) is not performing an essential function of sovereignty.

Respondents and amici assert that state action should nevertheless be found because, if the state performed the challenged activity, there would be a denial of warehouse storage depositors' due process rights. Such a proposition would, to borrow a phrase from Mr. Justice Brennan, stand the Bill of

Rights on its head, reading out of it completely the state action limitation upon the power of Congress and the federal judiciary to oversee creditor-debtor affairs between private parties. *Juidice v. Vail, supra,* 51 L. Ed. 2d at 388, 389 (Brennan, J., dissenting). Subjective views of Fourteen Amendment "values" as providing a needed solution to the "harsh" plight of depositors who are "at the unsupervised mercy of the warehouseman," under §7-210's accommodation of creditor-debtor interests, cannot change the result, *Shelley v. Kraemer,* 334 U.S. 1, 14 (1948); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949); *Krueger v. Wells Fargo Bank,* 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449, 452 (1974). The "state action" requirement, if it means anything, means that the Fourteenth Amendment has no application to the facts of this case.

The judgment of the Second Circuit Court of Appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Dated: New York, New York
January 10, 1978

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Petitioner,

against

SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,
Respondents.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,
Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,
Respondents.

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,
Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

Statement

This reply brief is submitted in response to the brief for respondents and to the several motions to file *amicus curiae* briefs in support of respondents.

I. Answering Respondents' Brief:

Starting at p. 3 of their brief, Respondents make reference to what Judge Holden below in dissent, 553 F. 2d at 775 *et seq.* called an ". . . unfortunate plight . . . [which] inspires concern". The relevant statute, U.C.C. § 7-210, however, was not the cause. Rather § 7-209 (the warehouseman's retaining lien), not at issue or under challenge now, was the reason. Detention, not sale which never occurred, caused the alleged hardship.

The statement on p. 9, ftn.**, "that the parties stipulated to the propriety of the class action . . ." is misleading. The Attorney General is a party here, in the Court of Appeals and the District Court, as is the American Warehouseman's Association and the International Association of Refrigerated Warehouses, Inc., as well as the Warehouseman's Association of New York and New Jersey, Inc., and the Cold Storage Warehousemen's Association of the Port of New York. None of the above stipulated to a class action. This "stipulation" and misleading statement is repeated (p. 10) in "Proceedings Below".

In response to Summary of Argument, New York has *not* delegated to warehousemen the function of dispute resolution, contrary to respondent's contentions. The dispute can continue after sale and the usual processes of court adjudication can take place. See *Dininny* v. *Reavis,* 100 Misc. 316 (Sup. Ct., N.Y. Co. 1915), aff'd 178 App. Div. 922, 65 N.Y.S. 97. Any conclusion of state action (Br., p. 13) is not controlled by the factors respondents cite.

Basically respondents rely on racial discrimination cases which have little, if no application, to the instant case.

Racial discrimination is at the heart of the Fourteenth Amendment; debtor-creditor relations are not.

In response to the "Argument" based on assistance of "governmental functionaries" (Br., p. 16), is that there is no such assistance, minor or otherwise. The concurrence in *Parks* v. *"Mr. Ford"*, 556 F. 2d 132, 148 (3rd Cir. 1977) really was a dissent there. *Id.* at 143-144. The presence of governmental assistance eliminated the state action issue in the *Sniadach* (395 U.S. 337 [1969]) line of cases.

The section under discussion serves to limit rather than create the enforcement of the warehousemen's lien. *Blye* v. *Globe-Wernicke Realty Co.,* 33 N Y 2d 15, 347 N.Y.S. 2d 170 (1973), is not relevant since it dealt with the initial imposition of the innkeeper's lien, a non-possessory general lien. Moreover *Blye* relied on the compulsion which it felt existed in this Court's decisions involving racial discrimination and federal decisions invalidating innkeeper's liens by several district courts. More recently, however, no state action was found in such liens by higher federal courts. See e.g., *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975); *Anastasia* v. *Cosmopolitan Nat. Bank,* 527 F.2d 150 (7th Cir. 1975), cert. den. 424 U.S. 928. See discussion of *Blye* in 61 Cornell Law Rev. 587, 590, 591, 596, 616-17 (*Evolving Concepts of the Innkeeper's Lien*) (1976).*

Respondents rely extensively (Br., pp. 13, 17, 22, 25, 26) on *Cox Bakeries of North Dakota, Inc.* v. *Timm Moving &*

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* The question is again before the New York Court of Appeals in the appeal of *Sharrock* v. *Dell Buick-Cadillac,* 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977) in which we have cited *IDS Leasing Corp.* v. *Hansa Jet Corp.,* 82 Misc. 2d 741, 369 N.Y.S. 2d 922, affd. 51 A D 2d 536, 377 N.Y.S. 2d 639 (2d Dept. 1976), upholding the garageman's lien. Respondents are correct at p. 22, ftn. *, that all parties have submitted their briefs in *Sharrock.* However from prior experience this year and conversations with the Clerk of the Court of Appeals it is four (4) months or more from submission of briefs to oral argument. Respondent's brief in *Sharrock* was only filed in December, 1977. It will be April, 1978 before we even argue. Thus this Court should not defer.

Storage, Inc., 554 F. 2d 356 (8th Cir. 1977) which agrees with the decision below.* But note the ftn. on p. 11 of respondents' brief, where in effect they say they have no objection to excluding the commercial use of the warehouseman's lien sale from this case, restricting it to consumer transactions, eliminating *Cox Bakeries* from the case at hand. In this regard they agree with the decision below, 553 F.2d at 774-775 which almost directs the exclusion of commercial warehousing from the case, citing *D. H. Overmyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972). In contrast to the instant case *Cox Bakeries, supra,* is a commercial situation, and thus even in the courts below's view sale "may be constitutionally unobjectionable." *Id.* at 774. On this basis *Cox Bakeries* is inapplicable here simply on respondents' representations and Brief for appellants, p. 45 in the court below.

Respondents' reliance (Br., pp. 26, 27) on *United States* v. *Kras,* 409 U.S. 434 (1973) is not helpful to them as this Court held in a case not having a state action question, that access to courts is not the only relief available to bankrupts and a discharge in bankruptcy is not a "fundamental" right. Thus a filing fee requirement for bankruptcy is not unconstitutional. It distinguished *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) at 443 *et seq.* The instant case has certain similarities. It may cost money to litigate** but that is not dispostive. See *Magro* v. *Lentini Bros.*

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* As such it is in direct conflict with *Melara* v. *Kennedy,* 541 F. 2d 862 (9th Cir., 1976). Respondents' attempt to distinguish *Melara,* Brief, p. 17, ftn., is misguided as well as incorrect. In so doing they disagree with the decision below, 553 F. 2d at 774, which states its holding is directly contrary to *Melara.* Furthermore *Melara* mentions the existence of a contract, but hardly relies on it. At 807-808 it rejected the delegation of state function theory. It came to this conclusion not based on a contract and only in the last sentence of "V" (at 808), says "further . . . Melara had notice . . . through the contract."

** It certainly has not cost the respondents any money. Their counsel provides free legal services.

Moving & Storage, 338 F. Supp. at 468, ftn. 9 (cited in our Main brief, p. 22). Since respondents had an attorney at all relevant times many courses were open to them, *Dininny* v. *Reavis, supra;* they were hardly restricted to a constitutional attack in federal court.

The attempt to downgrade *Hackett* v. *Nelson Express & Storage Co.* (Br. p. 31, ftn.), 162 Misc. 444, 446-447, 294 N.Y.S. 905, 909 (Sup. Ct., N.Y. Co. 1937) is strange. The decision called the statute on warehousemen's lien sales "wholesome". *Id.* at 447. It also explained itself (in holding for the warehouseman):

> "The defendant extended credit to the plaintiff over a period of months. Indeed, nothing was ever paid on the account. The defendant even paid out cash at the plaintiff's instance and request. There was a substantial compliance with the spirit of the statute; the purpose of the law was met. No fraud or collusion or bad faith is even hinted at. The conduct of the sale itself is not impugned. Only technicalities are relied on, technicalities which cost the plaintiff nothing."

Much of the Brief for Respondents otherwise concerns itself with the ultimate constitutionality of U.C.C. § 7-210, not at issue here, and is therefore not relevant here as we point out in our Main Brief, Point II.

II. If, contrary to our suggestion, this Court accepts the *amici* briefs this Court will find no additional support in such briefs for the decision of the court below.

A. *The Legal Aid Society*

The Legal Aid Society brief's effort to support the claim of state action here because of some asserted governmental interest is substantially weakened by its own successful contrary position in *Lefcourt* v. *Legal Aid Society,* 445 F. 2d 1150, 1155-56 (2d Cir. 1971); see also *Wallace* v. *Kern,* 481 F. 2d 621 (2d Cir. 1973), cert. den. 414 U.S. 1135 (1974).

This motion should be denied and the brief *amicus curiae* submitted should be disregarded for the reasons set forth *infra.*

The contention (Br. p. 7), without authority, that reversal of the Second Circuit "would mandate the withdrawal of all judicial involvement . . ." is not the case and is amply demonstrated by *Dininny* v. *Reavis, supra,* 100 Misc. 316, affd. 178 App. Div. 922, cited in our main Brief, pp. 18, 19, 21; *Magro* v. *Lentini Bros. Moving and Storage,* 388 F. Supp. 464, affd. 460 F. 2d 1064, *cert. den.* 406 U.S. 961, cited in our main Brief, pp. 20, 21, 22, and many other cases including *Weinstein* v. *Santini Transfer Co., Inc.,* 155 Misc. 139, 278 N.Y.S. 388 (City Ct., Bronx Co. 1935), cited by the proposed *amicus* and also assumes violation of due process, Br., p. 15, ftn. 7.

In footnote 2, p. 8 of the Society's brief it cites *Hernandez* v. *European Auto Collision, Inc.,* 487 F. 2d 378 (2d Cir. 1973) as a case where the Second Circuit found state action present, *cf.* p. 9 of Society brief (". . . implicitly found state action . . ."). It did not as shown in the decision below, 553 F. 2d at 774.

The Society's reliance on the *Blye* case, *supra,* Br. pp. 10, 11, 13 is particularly inappropriate. As we have pointed out, *Blye* only involved the hotel's imposition of a lien by seizing baggage, not the subsequent sale. See our Main brief, p. 11. In the case at hand, the possessory lien itself is not an issue. By not cross-petitioning for certiorari on the lien itself the respondents concede lack of state action here. *Cf.* 553 F. 2d, at 769, ftn. 10.

The reference by the Society to a 1976 newspaper article calling for expansion of regulation is not germane to the issue. Whatever further legislation may be desirable, there is at present jurisdictional authority in the State Attorney General (N.Y. Executive Law, § 63, subd. 12 and General Business Law, § 349) and in the New York City's

Consumer Protection Department (N.Y.C. Administrative Code 2203, d 2.0) for at least civil prosecution of any deceptive practices or unconscionability. During the course of the last two years no such legal action was instituted by the State Attorney General and we know of none by the City of New York. The Attorney General's Consumer Protection and Fraud Bureau has reported that it has successfully mediated any complaints respecting warehousemen, principally against two firms, arising mainly from misunderstandings about the signed agreement in which the customer acknowledges "receipt of this contract, the order for service contract and household goods bill of lading contract prior to start of service." The misunderstandings may be further avoided by the 1977 amendment, effective June 1, 1978 (L. 1977, Ch. 747) requiring all agreements to be "written in non-technical language and in a clear and coherent manner." The article is not concerned with the requirement for state action or due process protection. The position of the Attorney General has consistently been that such state action must be found before there is any discussion of the challenge to the lien or sale.

B. *New York State Consumer Protection Board*

Since that Board as other state agencies and officials has no statutory authority to appear in court in any capacity except through the State's Attorney General and the Board has been several times determined to be without any such authority (see the latest *Matter of Pooler* v. *Public Service Commission,* 58 A D 2d 940 [3d Dept. 1977], affd. —— N Y 2d —— [December 14, 1977]), it is the duty of the Attorney General to object to the filing of any brief, whether as *amicus* or otherwise, styled as being presented by the Board. Indeed it is doubtful that the brief presents the view of any one but the Executive Director of the Board.

The cases the Brief cites may be examples of moving company abuse but hardly are relevant to the issues of state action. *Weinstein* v. *Santini Transfer Co., Inc., supra,* obscure but also cited by the Legal Aid Society, is an action for conversion, demonstrating the adequacy of reme-

dies if the warehouseman abuses his right of sale. Main Brief, Point II. *Cf. Dininny* v. *Reavis, supra,* 100 Misc. at 317-318. Besides *Weinstein* cites no authority for the "matter of common knowledge" of abuses. *Jones* v. *Banner Moving & Storage, Inc.,* 48 A D 2d 928, 369 N.Y.S. 2d 804 (2d Dept. 1975) is technically a modification of the decision below but it completely reverses a declaration of unconstitutionality by the lower court.

We find it particularly strange that the Board brief, p. 7, cites *Magro* v. *Lentini Bros. Moving and Storage Co., supra,* 338 F. Supp. 464 (E.D.N.Y. 1971), affd. 460 F. 2d 1064 (2d Cir. 1972), cert. den. 406 U.S. 961 (1972). As the District Court there clearly held U.C.C. § 7-210 did not violate due process, assuming state action. This was in spite of the abuses of the warehouseman alleged. If they are irrelevant as to constitutionality, certainly those "abuses" are no better as to the question of state action.

The Board's assertion, Br., Point III, p. 8, *et seq.,* that affirmance of the court below will accommodate all interests is asking this Court to exercise a legislative judgment. Indeed the examples cited demonstrate that the New York Legislature remedies "abuses" when convinced of a particular statutory amendment.

The Board also alludes to *Bond* v. *Dentzer,* 494 F. 2d 302 (2d Cir. 1974), cert. den. 416 U.S. 837, p. 11 at ftn. 6 (also cited by the Legal Aid Society [Br., p. 8, ftn. 3]) where the Second Circuit found no state action but the Legislature amended the law. This despite the finding of absence of state action and consequently any declaration of unconstitutionality. Any greater state participation here, too, is for the Legislature. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-88 (1955); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973). It is not the function of the courts to remake the traditional practices of the enforcement of possessory liens as suggested in the various *amici* briefs. *Lindsey* v. *Normet,* 405 U.S. 56, 74-75 (1972).

C. *The City of New York*—This political subdivision of the State of New York has submitted an *amicus curiae* brief on the last day of its administration. This despite the fact that the New York Court of Appeals has held that a political subdivision has no standing to challenge constitutionality of a state law. *Town of Black Brook* v. *State,* 41 N Y 2d 486, 393 N.Y.S. 2d 946 (1977). More pertinently, the *amicus* expresses no interest in the constitutionality of U.C.C. § 7-210. It only states it has passed local laws protecting the consumer and is of course in a position to add thereto if deemed necessary.

United States v. *Wiseman,* 445 F. 2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967, cited by the City is not relevant. This was a criminal prosecution of private process servers who executed false affidavits of service to obtain default judgments in state courts. It was held on the facts to be a "public function"—namely they caused the Clerk of the state Civil Court, a state official, to do a wrongful act. *Id.* at 794-5. Ftn. 2 at 795 states that licensing is relatively insignificant as to state action. Ftn. 3 notes the greater likelihood of finding state action where racial discrimination is involved. At 796, it notes that there is only a narrow class of cases involves a "public function". It called service of process essentially and traditionally a public function.* *Wiseman* strongy demonstrates that private conduct must have a significant public character to be held state action. None of this exists in the instant case.

The Brief, p. 5, alludes to recourse to a plenary action, if the party can afford this. While free legal services are not a right, they are widely available. *Matter of Smiley,* 36 N Y 2d 433, 441, 330 N.E.2d 53, 369 N.Y.S. 2d 87 (1975). This instant case is an example. See p. 4, ftn. ** *supra.*

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* Although not mentioned, it may have been influenced by the fact that in federal court the U.S. Marshal serves summonses as a matter of regular course.

CONCLUSION

The order should be reversed and the complaint dismissed.

Dated: New York, New York
January 9, 1978

Respectfully submitted,

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Supreme Court, U. S.
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DEC 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMENS' ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS and GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS and GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK

This brief is submitted by the City of New York as *amicus curiae,* pursuant to Rule 42, subd. 4 of the Rules of this Court, in support of the position of the respondents Brooks and Jones.

Interest of the *Amicus*

The Department of Consumer Affairs of the City of New York has sought pursuant to statute (Local Law No. 83, 1969, N.Y.C. Admin. Code, Title A, Ch. 64) to protect the interests of consumers within its jurisdiction from fraudulent or overreaching practices, and in so doing to protect the interest of the business community in the jurisdiction which are injured as well by such practices. The Department receives substantial numbers of complaints involving warehousemen's liens from consumers who believe they have been abused by moving and storage firms.

The Department has been particularly active in attempting to insure that remedies on the part of creditors including but not limited to lien holders for collection of amounts allegedly due are fair as well as effective. See, e.g., Consumer Protection Law Regulation 4 (pertaining to pressure on employers by creditors), upheld in *Commercial Lawyers Conference* v. *Grant,* 65 Misc. 2d 897, 318 N.Y.S. 2d 966 (Sup. Ct. 1971).

In addition, the Department plays an important role in preserving the integrity of the judicial process in connection with such matters, through its licensing of process servers, New York City Administrative Code Chapter 32, Title B, § B32-450.0 *et seq.* This has led to a number of actions vacating default judgments where abuses have occurred.

The benefits to be derived from these efforts of the Department on behalf of the public and the business community would be rendered ineffective to the extent that exercise of liens for disputed amounts without recourse effective to preserve the rights of the alleged debtors is upheld.

ARGUMENT

I. State Action Should Be Found In The Execution of A Statutory Warehouseman's Lien.

It is firmly established that the judicial process of a state is state action within the meaning of the Fourteenth Amendment, e.g., *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). Private acts which are part of judicial machinery have also been found to constitute state action even in the context of criminal prosecution. *United States* v. *Wiseman,* 445 F.2d 792 (2d Cir. 1971), *cert. denied,* 404 U.S. 967 (1971).

The statutory warehouseman's lien in issue (N.Y.U.C.C. §§ 7-209 and 7-210) is a substitute for that judicial process, erected by the state, which expressly authorizes private parties to carry out the statutory scheme.

The state, of course, defines property rights. The act of establishing such definitions is, of course, state action in the ordinary sense, whereas the conduct of private parties in transferring property pursuant to such state-created rights is private action in the ordinary sense and would not normally constitute state action.

Here, however, no consensual agreement to the lien or its enforcement is present or necessary under the statute. We are not dealing with a situation where a party knowingly creates a property interest in another pursuant to rules of the game established by the state. This, of course, would normally be interpreted as the act of the parties and

not of the rule-making state. Rather, here the state by statute inserts into the normal flow of consensual arrangements of private parties, a statutory procedure giving one of the parties powers usually possessed by the state: the right to compulsory taking of the property of another. This power, whether analogized to the act of the sheriff in seizing an item, or the exercise of the power of eminent domain, is compulsion and is thus state action under any test. See Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion" 35 Colum. L. Rev. 149 (1935); *Parks* v. *"Mr. Ford,"* 556 F.2d 132, 141 (3d Cir. 1977); *Cox Bakeries* v. *Timm Moving & Storage, Inc.*, 554 F.2d 356, 358 (8th Cir. 1977); *Hernandez* v. *European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973), cf. *Blye* v. *Globe-Wernicke Realty Co.*, 33 N.Y.2d 15 (1973). *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and other cases where state action was found lacking did not involve these elements.

Moreover, the practical impact is to deprive citizens of rights which they would otherwise have, to safeguards present in the judicial process The unilateral action of the warehouseman can deprive the customer of all interest in the goods. No action on the part of the other party is required.

Where the judicial process is utilized, notice and an opportunity to be heard are necessary. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). Similarly, the state itself has often erected safeguards to prevent the abuse of "default judgments" where a party does nothing, and the other may obtain an unfair advantage due to difficulty or inability of the defendant to obtain counsel or to respond for other reasons. E.g., New York Judiciary Law §217(a); *In re Vigilant Protective Systems, Inc.*, 333 F.Supp. 1029 (S.D.N.Y. 1971).

The practical effects of a decision on the state action issue, while not dispositive of the legal issue, bear discussion because petitioners give them much stress. A finding of state action would not have the catastrophic effects predicted by counsel for the warehousemen before this Court. Once due process is applicable, its parameters depend on the circumstances; a "rule of reason" applies. Compare *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), with *North Georgia Finish, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975).

The state action question is a threshold question. For this Court to hold that what is involved here is not state action would deprive those affected by these state-created lien procedures of any constitutional protection. This would be seriously detrimental to the interests of the public and of the business community. On the other hand, a finding of state action does not compel automatic imposition of all of the detailed safeguards normally present in judicial proceedings.

The validity of a particular self-help creditor enforcement procedure obviously depends on the factual setting. Requirements applicable to judicial proceedings are not mechanically transferable as a matter of constitutional law. On the other hand, a rudimentary opportunity to obtain an impartial ruling on contested matters seems inherent in basic fairness. Without this, the weaker party under the statutory framework is deprived of any effective recourse at all: the warehousemen can claim any amount, no matter how hyperbolic, and simply sell the victim's property to satisfy the most insatiable demands. The only recourse would be a plenary action later, if the party can afford it, with uncertain and delayed results.

Based on the prior decisions of this Court, the constitutional requirements in such a situation would seem to

involve (1) advance notice to the owner of the goods of the amounts claimed, the basis for the charges, and the date and arrangements for any auction planned, and what recourses are available to the owner, with sufficient time for the owner to appear or take other action, and (2) some hearing procedure short of filing a plenary lawsuit, which would give the owner an opportunity to be heard on whether there is a valid contract, the amount payable, and whether the charges claimed are at least reasonable and within the contemplation of the parties at the time of the original transaction.

Due process requires at least this. Compare *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928). The combination of judge, jury, legislature and sheriff in the hands of one party here is too much. Cf. *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

CONCLUSION

The judgment below should be affirmed so that, as Mr. Justice Clark stated in *Cox Bakeries* v. *Timm Moving & Storage, Inc.*, 554 F.2d 356, 360 (8th Cir. 1977), owners of goods will not be "at the unsupervised mercy of [warehousemen] without any judicial supervision or control whatever . . .".

December 22, 1977

Respectfully submitted,

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DEC 23 1977

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, et al.,
Petitioners,
-against-
SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, et al.,
Petitioners,
-against-
SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS, AND STATEMENT OF INTEREST OF THE AMICUS.

The Legal Aid Society of New York City respectfully moves the Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of respondents, by reason of the Society's substantial interest in the outcome of this case and its considerable experience in litigation concerning the constitutional issue presented herein.

1. The question presented in this case -- whether judicial intervention is proper to require creditors to comply with the requirements of due process when employing the summary remedy of sale of customer property to enforce a warehouseman's lien -- is of basic importance to large numbers of indigent persons in New York City whom the Society

serves.

2. The Civil Division of The Legal Aid Society affords legal representation and assistance in civil matters to persons in the City of New York who cannot afford private counsel. The client population of the Civil Division includes substantial numbers of persons who lose or are threatened with loss of their personal property in sales by warehousemen and other types of lienors. Many of these clients surrender their property to the lienor under pressure of circumstances such as those faced by plaintiffs herein; many dispute the charges later imposed by the lienor. The constitutional issue involved in this appeal is of great importance to those persons who have defenses to the amount or validity of the alleged liens but are unable to free their

property without paying whatever the lienor demands, and under the challenged statute are not guaranteed the right to defend in court against the lienor's unilateral charges prior to the sale and final disposition of their property. The Society's lawyers are familiar with the kind of fact pattern presented here and understand the impact which unfettered use of the lien enforcement methods employed by defendants herein can have upon the City's poor.

3. The Society's lawyers also have considerable experience with the constitutional question of whether state action inheres in the type of summary creditor's remedy here challenged. The identical state action question in an analogous context was presented and resolved in favor of the plaintiff-debtor, represented by the Society, in Blye

v. Globe-Wernicke Realty Co., 33 N.Y. 2d 15 (1973), which invalidated the seizure provisions of the New York innkeeper's lien contained in New York Lien Law Section 181. In Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973), the Society's lawyers, representing plaintiff, successfully challenged the enforcement by sale of the garageman's lien authorized by sections 200 - 202 and 204 of the New York Lien Law. The issue of state action was fully briefed by plaintiff's counsel, and in directing the District Court to try the case on the merits of the due process claims, the Second Circuit Court of Appeals implicitly found the requisite state action present. Similarly, in Jones v. Banner Moving & Storage, Inc., 78 Misc. 2d 762 (Sup. Ct. Kings Cty. 1974), in which the Society represented the plaintiff, the Court implicitly found state action in

the very provision challenged here, by declaring the New York warehouseman's lien statute violative of due process. The Appellate Division reversed on other grounds, finding it unnecessary to resolve the constitutional issue raised by plaintiff in light of the possibility of a determination in plaintiff's favor on an alternative cause of action. 48 A.D. 2d 928 (2d Dept. 1974).

4. The Society has thus been actively involved in the development of the contours of the state action doctrine as it relates to summary creditor's remedies in New York. Its experience and familiarity with the issue provide a unique perspective from which to view the implications of this Court's decision in this case for low-income consumers and for the over-all legal framework which

defines debtor-creditor relationships. The Legal Aid Society therefore has an obvious and immediate interest in the issue before the Court in this case. Counsel for respondents has consented to the filing of this brief amicus curiae. This motion is filed because counsel for the Attorney General of New York State, one of the appellants, has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-25
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LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, et al.,
Petitioners,
-against-
SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY IN SUPPORT OF RESPONDENTS.

STATEMENT OF CASE

This case concerns the applicability of the Due Process Clause of the Fourteenth Amendment to New York's Uniform Commercial Code Section 7-210, which authorizes a warehouseman to sell a customer's goods summarily without affording the customer a hearing on the validity of the underlying debt. The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim, on the ground that the warehouseman's sale pursuant to statute did not constitute 'state action' or action 'under color of' state law within the meaning of the Fourteenth Amendment and 42 U.S.C. § 1983. 404 F.Supp. 1059 (1975). The Court of Appeals for the Second Circuit, with one judge dissenting, reversed, holding that the combination of New York's statutory delegation of power to the warehouseman, and

its corresponding expansion of his common law remedies, thrust the State's involvement in the challenged activity over the threshold of state action required to invoke the requirements of the Fourteenth Amendment. 553 F.2d 764 (1977). This Court granted certiorari to consider the question of whether the enforcement of a lien pursuant to Uniform Commercial Code Section 7-210 in the context of this case involves state action and is therefore subject to the constraints of the Due Process Clause of the Fourteenth Amendment. By this amicus curiae brief submitted in support of the respondents, The Legal Aid Society of New York City sets forth its argument as to why this Court should affirm the finding of state action by the Court of Appeals and remand the case to the District Court for determination of whether the statutory scheme

at issue comports with due process.

The factual allegations of plaintiffs, taken as true here since the case was decided below on the basis of defendants' motion to dismiss, are similar in the cases of the plaintiff Mrs. Shirley Brooks and the plaintiff-intervenor Mrs. Gloria Jones. Each was evicted from her apartment by a Marshall of the City of Mount Vernon, New York. Each was told by the Marshall at the time of eviction that only the defendant warehouseman, Flagg Brothers, Inc., could remove and store her goods and furniture. The president of Flagg Brothers accompanied the City Marshall at both evictions. In Mrs. Brooks' case, a dispute arose over the rapidly escalating storage charges and she refused to pay them. When Flagg Brothers threatened to sell Mrs. Brooks' property on the authority of the sales provisions of

§ 7-210, this lawsuit was instituted, seeking to enjoin the sale and declare § 7-210 constitutionally invalid. The decision of the Court of Appeals indicates that by agreement of counsel, Mrs. Brooks was eventually permitted to remove her goods from Flagg Brothers' warehouse without paying the disputed charges. 553 F.2d at 768.

Mrs. Jones was also involved in a dispute concerning the amount of storage charges, and faced a threatened sale of her property pursuant to § 7-210 at the time she moved to intervene in this lawsuit. The decision below states that after the District Court dismissed the action, Mrs. Jones paid Flagg Brothers $1600 in order to achieve the return of her goods, but not all of them were returned and some were returned in damaged condition. 553 F.2d at 768 n. 7.

Thus both plaintiffs had their goods taken into custody by defendant Flagg Brothers under circumstances which were, at best, coercive. Their imminent evictions, combined with the City Marshall's apparent imprimatur of authority upon this particular warehouseman, gave plaintiffs no choice as to how to store their goods. Despite substantial and good faith grounds for disputing the storage charges demanded by Flagg Brothers, had they not had the good fortune to obtain legal counsel plaintiffs would have been forced to allow the bulk of their worldly possessions to be sold without a judicial determination of the amount owing, since they were totally unable to pay the full amount demanded. In the case of Mrs. Jones, the need for use of her goods was so great that she eventually acceded to Flagg Brothers'

demands, paying an exorbitant sum for their return, only to receive incomplete and marred property.

ARGUMENT

AN AFFIRMANCE OF THE SECOND CIRCUIT'S STATE ACTION FINDING IN THIS CASE WILL BRING WITHIN THE AMBIT OF DUE PROCESS CONSTRAINTS THE MOST ARBITRARY AND ABUSIVE CREDITOR REMEDIES, AND WILL PREVENT THE ARROGATION TO CREDITORS OF VIRTUALLY UNCHECKED POWER TO SUMMARILY AND WRONGFULLY DEPRIVE LOW INCOME AND UNKNOWLEDGEABLE CONSUMERS OF THEIR PROPERTY.

1. Introduction

This Court's affirmance of the Second Circuit's state action finding in this case will enable the federal and state courts to require the most arbitrary and severe of the state statutory creditor's remedies to conform to the minimal procedural requirements of due process; conversely, a reversal of the decision below by this

Court would mandate the withdrawal of all judicial involvement and all due process safeguards from these summary creditor's remedies and would effectively leave low-income consumers wholly unprotected against the over-reaching and abusive creditor practices which are permitted by these remedies. These nation-wide implications of this Court's decision in this case are reflected by its inevitable impact in the State of New York.

New York State, and particularly the New York City metropolitan area, is the commercial and consumer transaction center of the United States, and this state makes available the whole range of summary creditor remedies which are utilized throughout the country by creditors to execute against consumers' property for alleged consumer indebtedness.[1] The issue of the constitutionality

1. (fn. next page)

of these various summary creditor's remedies, including the threshold question of state action, has been broadly addressed by the Second Circuit Court of Appeals and the New York Court of Appeals in five cases. In three of those cases,[2] state action was found to be present in statutorily authorized summary procedures; in the other two cases[3] there was found to be insufficient state in-

1. See generally, Note, Future of Creditor's Remedies in New York: The Impact of Fuentes and Blye, 38 Albany L.R. 467 (1974).

2. Brooks v. Flagg Bros., 553 F.2d 764 (2d Cir. 1977); Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973); Blye v. Globe-Wernicke Realty Co., 33 N.Y. 2d 15 (1973).

3. Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2d Cir. 1974), cert. denied, 419 U.S. 1009 (1974); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974).

volvement to constitute state action. The Second Circuit rejected the contention that state action inheres in the widely utilized method of "self-help," peaceful repossession, Shirley v. State National Bank of Connecticut,[4] supra, or in the execution of a contractual, pre-judgment wage assignment, Bond v. Dentzer, supra.[5] On the other hand, in Hernandez v. European Auto Collision, supra, the Second Circuit implicitly found state action in the enforcement by sale of the garageman's lien pursuant to New York Lien Law Sections 200-204, remanding the case for a trial on the merits of plaintiff's due process claims. See also, Tedeschi v.

4. The statute at issue in Shirley was the Connecticut counterpart to New York Uniform Commercial Code Section 9-503.

5. Bond involved a challenge to New York Personal Property Law Section 3-A.

Blackwood, 410 F.Supp. 34 (D.Conn. 1976) (three-judge court) finding state action in enforcement by sale provisions of the Connecticut statute authorizing a garageman's lien for towing and storage charges). Hernandez was decided within days of the New York Court of Appeals decision in Blye v. Globe-Wernicke Realty Co., supra, in which state action was found in the statutory provision, New York Lien Law Section 181, authorizing the seizure by a hotel keeper of a boarder's property to satisfy a debt without prior hearing. See also, Sharrock v. Dell-Buick, 56 A.D. 2d 446 (2d Dept. 1977). In Brooks, the Second Circuit distinguished Shirley and Bond, which concerned creditor's remedies fully grounded in common law and contract and invoking no enforcement power traditionally reserved to the sovereign, from the statutory provisions at issue in this case

and in Hernandez and Blye, all of which concern enforcement methods wholly created by statute, delegating to the creditor powers distinctly governmental in nature. See 553 F.2d 772-774.

Together, the decisions in the Second Circuit and the New York Court of Appeals embody a state action approach which strikes a necessary balance between the interests of creditor and debtor, an approach which has resulted in the requirement that the most harsh and arbitrary of the summary creditor remedies comport with the minimal notice and hearing requirements of due process, while leaving undisturbed remedies involving purely private arrangements in which the risk of an unremedied wrongful deprivation of the debtor's property is less substantial.

II. Reversal of the Court of Appeals' Decision Herein Would Remove All Judicial Checks On The Most Arbitrary Of Summary Creditor Remedies And Destroy The Rough Accommodation Of Creditor And Consumer Interests Which Due Process Alone Makes Possible.

The Court's reversal of the Second Circuit decision in Brooks would necessarily remove entirely all due process restraints from those summary creditor's remedies which give creditors unchecked and untrammeled power to subject less knowledgeable and less powerful consumers to wrongful and arbitrary deprivations of their property. The consequent removal of all due process limits on these arbitrary summary creditor's remedies would hand creditors and the state legislatures they influence a carte blanche to perpetuate and even enhance state sanctioned creditor's remedies which effectuate the final and complete deprivation of the basic possessions of

consumers, without the requirement that those creditors ever be required to test in court the validity and accuracy of their unilateral self-serving allegations of consumer indebtedness.

Among the collection procedures utilized by creditors, the legislatively-sanctioned enforcement of liens such as those analyzed in Brooks, Blye and Hernandez, involving summary sale of the customer's personal property without a hearing on the validity of the underlying debt, are particularly susceptible to abuse by unscrupulous lienors who seek to profit by their superior economic position and knowledge of the legal system at the expense of unsuspecting and beleaguered consumers.

The experience of Amicus is that the plight of Mrs. Brooks and Mrs. Jones is

not unusual.[6] Warehousemen in particular may first obtain possession of the customer's goods in emergency circumstances such as an eviction, when the customer is frightened, bewildered and lacks the information, time or presence of mind to question the warehouseman about moving and storage charges, or make a deliberate decision about how to dispose of his/her property. Once the warehouseman has custody of the property, the charges begin to escalate. If the customer does not pay the full amount demanded because he/she cannot afford to do so or because of disputes over the charges, they continue to mount up, until the customer is threatened with irrevocable loss of his/her goods by their sale unless the now even more exorbitant fees are paid.

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6. See, e.g., cases discussed in Brief of Amicus Curiae New York State Consumer Protection Board.

With the assurance that the vast majority of customers will be unable or unwilling, because of their urgent need for return of their property, to affirmatively contest the amounts demanded by bringing suit, the lienor may exaggerate the cost of his services with impunity, never having to justify the accuracy and reasonableness of his calculations in a judicial proceeding. In the words of the Chief of the Consumer Frauds and Protection Bureau of the New York State Attorney General's office:

> It's unregulated piracy. Once the warehousemen have your goods, you are in the land of Captain Kidd, and they have you hook, line and sinker ... In New York, warehousemen operate with impunity from the law to the point where, before you get meaningful aid and when there is a dispute, your goods are sold at auction.[7]

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7. New York Times, August 22, 1976, page 1. Cf. Weinstein v. Santini Transfer Co., Inc., 155 Misc. 139 (City Ct. of N.Y., Bronx Cty.
(cont'd next page)

The risk of wrongful use of the summary remedy authorized by § 7-210 is thus greater than in the retail installment sale or installment loan situations in which the creditor may resort to a wage assignment or self-help repossession. In those situations, the amount of the debt is recorded on a written instrument and is not easily controlled by the creditor or subject to dispute.

It is important to note that the gravity of the deprivation suffered by a consumer whose property is wrongfully sold pursuant to § 7-210 far exceeds that of any of the pre-judgment, temporary deprivations upon which this Court has imposed due process

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1935), in which, commenting on the improper sale of plaintiff's goods pursuant to a predecessor of § 7-210, the Court stated:

> It is a matter of common knowledge that a great many sales are conducted by warehousemen and others in a similar manner and that advantage is thus taken of the needy and helpless who might be incapable of protecting themselves. 155 Misc. at 142.

constraints. See generally, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). Even before application of due process standards, all of the remedies previously considered by this Court provided more balanced accomodation of creditor and debtor interests than the warehouseman's lien statute challenged here. Sniadach involved a pre-judgment garnishment provision, enabling the creditor to freeze an alleged debtor's wages as a provisional remedy, in conjunction with the initiation of a lawsuit on the underlying debt. The creditor was not permitted to dispose of the debtor's wages and could not utilize the garnishment procedure without filing a lawsuit within ten days. Fuentes

applied due process constraints to replevin procedures which allowed the debtor's property to be seized and held pending the outcome of the creditor's action for repossession which was required to be filed before the goods could be seized, and which permitted no disposition to be made until a final adjudication of the underlying claim. See also, Laprease v. Raymours Furniture Company, 315 F.Supp. 716 (N.D.N.Y. 1970) (state law provisions allowing pre-judgment seizure of chattels by plaintiff in a replevin action without court order violate due process). In Mitchell a prompt post-seizure hearing was held to accord the debtor adequate due process protections when his/her property was attached and sequestered to guard against its deterioration, concealment or damage pending trial on the creditor's underlying claim.

In finding that a post-seizure hearing, in which the burden is on the creditor to prove the grounds for seizure, was sufficient, the Court placed substantial reliance on the statutory requirement of judicial authorization of the initial writ of attachment:

> Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. [Footnote omitted.] This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking. Mitchell v. W.T. Grant, supra, at 616-617.

In contrast, no judicial control whatsoever is exercised over the authority afforded the warehouseman under § 7-210; the state has provided no safeguards to reduce the likelihood of error arising from fraudulent creditor claims. Moreover, the statute allows the debtor's property to be sold without any judicial proceeding, at any time, removing the possibility of returning the goods to the debtor should he/she ultimately prevail on the merits:

> The statutory scheme before us ... contemplates no judicial -- or even impartial -- determination of the amount owing before a final deprivation of property. [Emphasis added.] 553 F.2d at 771; see also, Hernandez, supra, at 385.

Hence, if this Court fails to find state action in the statutory provision at issue here, authorizing sale of the customer's goods without a hearing, it will divest the judiciary of the power to prevent overreaching in the enforcement of the warehouseman's and similar liens through the imposition of due process restraints, and it will eliminate the only effective check on abuse of such practices. Low-income consumers lack sophisticated knowledge of the relevant procedures and adequate access to legal services necessary

to commence a plenary action to enjoin a threatened sale of their goods. Even if the consumer understands the notice of sale sent in accordance with § 7-210 and can retain an attorney, the length of time afforded by the statute prior to sale (25 days) is often simply insufficient to initiate a lawsuit and obtain temporary relief.[8] In light of these difficulties, as this Court has noted, the prospect of consumer lawsuits is highly unlikely to chasten the unscrupulous creditor:

> For if [he] knows that he is dealing with an uneducated, uninformed consumer with little access to legal help, and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property -- however unwarranted -- may go unchallenged, and the [creditor] may feel that he can act with impunity.
> Fuentes v. Shevin, 407 U.S. 67, 83 at n. 13 (1972).

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Nor can legislative action be relied upon to redress the imbalance in bargaining power between creditor and consumer in this context. While the United States Congress has taken initiative to protect consumer interests in wide-ranging statutory enactments,[9] the rights and obligations of a lienor intra-state do not directly involve interstate commerce and have been left entirely to regulation by individual states. State legislatures, notably responsive to the influence of organized, well-financed interest

8. An application for a temporary restraining order or preliminary injunction staying the sale requests extraordinary relief and imposes a substantial burden of proof on the applicant. Even if the application is granted, the consumer may be required to post a bond which he/she cannot afford. See, New York Civil Practice Law and Rules, Sections 6312 and 6313; Margolis v. Encounter, 42 N.Y. 2d 475, 479 (1977); Caesar v. Kiser, 397 F.Supp. 645, 649 (M.D.N.C. 1975).

9. See, e.g., "Fair Debt Collection Practices Act," PL 95-109, September 20, 1977; "Fair Credit Reporting Act," 15 U.S.C. § 1681;

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groups such as commercial and creditor lobbies, cannot be expected to amend existing summary remedy provisions to afford greater protection to consumer interests.[10] Forerunners of § 7-210 have been on the books in New York since 1879, Ch. 336 (1879), N.Y. Laws 417, and there is no reason to believe the New York State legislature regards the possible abuse of the power of sale conferred thereby on warehousemen with any more urgency now than it has over the past century.[11]

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"Equal Credit Opportunity Act," 15 U.S.C. § 1691 et seq.; "Truth-in-Lending Act," 15 U.S.C. § 1601 et seq.

10. Brown, Personal Property, § 13.1, p. 391 (3rd Ed., 1975). See generally, Note, Wage Garnishment as a Collection Device, 1967 Wis. L. Rev. 759; Clark, Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation, 51 Ore. L. Rev. 302 (1972).

11. In fact, a bill introduced during the 1977 legislative session to regulate and license warehousemen, A. 4505, was stifled in committee.

Indeed, if it were to reject the limited state action finding in Brooks, this Court would invite state legislatures to insulate additional creditor's remedies from the dictates of due process simply by amending existing statutes to withdraw the nominal participation of state officials which has rendered these enforcement provisions subject to judicial scrutiny in the past. See, e.g., Sniadach, supra; Fuentes, supra. See also, Parks v. "Mr. Ford," 556 F.2d 132, 150 (3rd Cir. 1977) (Gibbons, J., concurring).

Thus, this Court's affirmance of the finding of state action in this case will preserve the minimal judicial involvement which alone can assure that the drastic lien enforcement procedures at issue in Brooks, Blye and Hernandez are brought within the ambit of the Fourteenth Amendment's Due Process Clause. Further, an affirmance here will leave undis-

turbed the conclusion of the New York courts that those summary procedures which are entirely a function of private ordering and which contain relatively greater built-in safeguards against misuse, such as the repossession and wage-assignment procedures sustained in Shirley and Bond, do not involve state action and hence are not subject to due process constraints.[12]

In sum, the drastic change in the balance of power between debtor and creditor occasioned by reversal of Brooks would have dramatically harmful effects upon the consumer who is already at a disadvantage in dealing with more powerful and knowledgeable creditors. The creditor, on the other hand, will hardly be burdened by the imposition of minimal due process constraints on the narrowly defined group of summary remedies encompassed by a finding of state action in this case.[13]

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12. The reasoned and balanced analysis of the state action issue which has been adopted by the New York courts is also reflected in the decisions of most other jurisdictions. Thus, the lower courts have found state action present in the more pernicious creditor remedies embodied in the warehouseman's, garageman's and innkeeper's lien laws. See, e.g., Parks v. "Mr. Ford," 556 F.2d 132 (3d Cir. 1977) (en banc) ("garageman's lien"; state action); Cox Bakeries v. Timm Moving and Storage, 554 F.2d 356 (8th Cir. 1977) ("warehouseman's lien"; state action); Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975) ("innkeeper's lien"; state action); see also, Stypmann v. City of San Francisco, 557 F.2d 1338 (9th Cir. 1977) (possessory lien for towing and storage fees; state action). On the other hand, the courts have declined to find state action in the less drastic creditor remedies. See e.g., Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927 (1st Cir.), cert. denied, 419 U.S. 1001 (1974) (bank's right of set-off; no state action); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) (repossession; no state action); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974)(repossession; no state action).

13. The requirement that the warehouseman observe the fundamentals of due process will not impair the possessory lien itself, nor destroy the ability of the lienor to sell a customer's property to enforce his lien, so long as an opportunity for prior hearing is afforded. See Blye, supra at 22. Nor is there any evidence

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to indicate that the imposition of due process constraints would increase the cost of warehousemen's services. The argument that consumer protective limitations on creditor remedies will significantly increase the cost of credit is perennially raised by creditors, but has never been borne out by economic analysis. See, e.g., G. Benston, Risk on Consumer Finance Company Personal Loans, J. Finance, Vol. 32 #2, May, 1977.

CONCLUSION

By confirming the applicability of minimal due process constraints to the enforcement by sale provision of the New York warehouseman's lien statute, affirmance of the Court of Appeals' finding of state action in Brooks will facilitate the restoration of a modicum of balance and fairness to a procedure which, with substantial risk of error and misuse, allows the creditor to summarily dispose of a customer's property without ever establishing the validity of the underlying debt. The Due Process Clause affords the only effective protection against arbitrary and overreaching use of this procedure to hard-pressed, ill-informed consumers threatened with imminent sale of their goods pursuant to § 7-210. On the other hand, a decision of this Court remov-

ing activities authorized by this statutory provision from judicial scrutiny will pave the way for further delegations of unsupervised authority to other groups of creditors, tipping the fragile balance between debtor and creditor interests reflected in lower court decisions on this issue decidedly in favor of the already advantageously positioned creditor. For all of the above reasons, Amicus urges that the judgment of the Court of Appeals be affirmed.

Dated: New York, New York
December 19 , 1977

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1977
NOS. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND THE BRIEF AMICUS CURIAE

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In the

Supreme Court of the United States

OCTOBER TERM, 1977

NOS. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Rule 42 of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter,

the Board) respectfully moves for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the respondents has been obtained. However, the attorneys for the petitioners refuse to consent to the filing of the brief by the Board as *amicus curiae*.

The New York State Consumer Protection Board as part of the Executive Department of the State of New York is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The Board has the power and duty, *inter alia*, to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interest of consumers of the state before federal, state and local administrative and regulatory agencies; to study the operation of consumer protection laws and to recommend to the Governor laws for the protection of consumers; and to cooperate with and assist consumers in class actions. (N.Y. Exec. L. §553).

The Board as the representative of New York consumers offers a perspective which is not otherwise available to this Court. Since 1970, when created by the New York Legislature, the Board has developed considerable expertise in the problems arising from creditor-debtor relationships. The Board has drafted comprehensive legislation to modify a number of laws regulating credit in New York State, testified at legislative hearings on creditor-debtor problems, and produced several pamphlets and movies on the subject.

The Board also assisted the plaintiffs and filed a brief as *amicus curiae* in *Juidice v. Vail*, 97 S. Ct. 1211 (1977) which involved the constitutionality of the New York contempt statute when used to collect consumer debts. This Court granted the Board's motion for leave to file a brief as *amicus curiae* even though the New York Attorney General, who represented the opposing party, refused to consent to the filing of the brief. *Judice v. Vail*, 97 S. Ct. 251 (1976).

The consumers of New York State are faced with the question in this case whether owners of consumer goods are constitutionally protected from warehousemen permanently disposing of their goods by selling them without an opportunity for a hearing. The Board submits that the constitu-

tionality of U.C.C. §7-210 which, authorizes warehousemen to enforce their liens by selling stored property, must be examined with an understanding of the abuses by warehousemen that have been fostered by this procedure. Only with an understanding of the context of this case can this Court fully comprehend the implications of its decision. The Board is in a unique position as the New York State consumer agency to draw from its practical experiences and expertise to provide this background for the Court.

We, therefore, submit that the Board has a significant interest in the case before this Court, and experience with the issues in this case which enable it to present a brief *amicus curiae* which will aid the Court in its deliberations.

Respectfully submitted,

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Consumer Protection Board

I. INTRODUCTION

The legal issue raised in this case is whether the enforcement of the warehouseman's lien pursuant to N.Y. U.C.C. §7-210 constitute action under color of state law in violation of 42 USC §1983 and state action under the due process clause of the 14th Amendment.

For owners of personal property and household goods, this issue translates more concretely into the question whether owners of consumer goods are constitutionally protected from warehousemen permanently disposing of their goods by selling them without an opportunity for a hearing.[1] The warehouseman's authority to sell the property in this case is exclusively derived from U.C.C. §7-210, and not from a contract with an owner who voluntarily placed the property in the possession of the warehouseman.

The Court of Appeals captured the meaning and impact of the sale provisions of the statutory warehouseman lien when Judge Frederick Van Pelt Bryan, for the majority, stated that:

> Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judically established, and then have the sheriff execute upon the goods which he concedely has the common law right to hold as security . . . *It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions* . . . (emphasis added) *Brooks v. Flagg Bros.*, 553 F. 2d 764 (2nd Cir. 1977)

The statutory circumvention of the judicial process has caused owners of personal property and household furnishings anguish, extraordinary expense and inconvenience throughout the State of New York. Therefore, the New York State Consumer Protection Board wants to offer this Court a factual

[1]The issue is not whether the warehouseman should be paid, but whether the drastic remedy of foreclosure without an opportunity for a hearing is constitutionally permissible in view of the warehouseman's right to a possessory lien and his access to other remedies. See, *Parks v. Mr. Ford*, 556 F. 2d 132, 162 (3rd Cir. 1977) (Gibbons, J) (concurring).

and legal backdrop against which to decide the legal questions raised in this case by discussing cases in New York that reveal the extent of problems caused by warehousemen and by analyzing the consequences of an affirmation or reversal by this Court.

The only authority to enforce the warehouseman's lien is found in U.C.C. §7-210 where the New York Legislature established procedures for foreclosing on the lien. U.C.C. §7-210 requires that all persons known to claim an interest in the goods be notified of the forthcoming sale. Once complied with, New York law authorizes the warehouseman to sell the stored property and to use the proceeds of the sale to satisfy his lien. The statutory procedure does not require any opportunity for a hearing prior to nor subsequent to the sale, but rather limits the warehouseman's responsibility to mere notice of a prospective sale. In short, as expressed in *Brooks:*

> The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally. *Brooks v. Flagg Brothers, supra* at 771.

II. THE LEGISLATURE'S FAILURE TO PROVIDE OWNERS OF PROPERTY AN OPPORTUNITY FOR A HEARING PRIOR TO SALE IS ABUSED BY WAREHOUSEMEN

Because of the statutory protections provided warehousemen by U.C.C. §7-210, warehousemen have retained property and threatened to sell or sold property with impunity in spite of objections and disputes raised by owners of properties.

Stephen Mindell, Chief of the Frauds Division in the New York State Attorney General's office concluded that:

> It's unregulated piracy. Our office is bombarded with complaints each year, but there is little we or anybody can do because storage is a completely unregulated industry.

> They give the consumer a bill with a number of charges they never disclosed before, and if the consumer dares to question or challenges them they threaten to and sometimes sell his goods at auction. NY Times, August 22, 1976, p. 1 Col. 5 and p. 36 Cols. 3-8.

Although no one has conducted a comprehensive survey of the pervasiveness of this problem, it is instructive to review the warehousemen cases which have reached the courts in New York State. Unfortunately, this review is limited to those owners of stored property with access to counsel who brought suit. These cases illustrate the problems caused by the U.C.C. statutory procedures that authorize the sale of stored property without any judicial monitoring or scrutiny.

In *Weinstein v. Santini Transfer Co. Inc.*, 155 Misc. 139 (City Ct. NY, Bronx Cty, 1935), the Court recognized that:

> It is a matter of common knowledge that a great many sales are conducted by warehousemen and others in a similar [bad faith] manner and that advantage is thus taken of the needy and helpless who might be incapable of protecting themselves. *Id.* at 142.

In *Knox v. DeCarolis Moving and Carting Co.*, No. 8941/75 (Sup. Ct. County of Monroe, 1975), *Jones v. Banner Moving and Storage Inc.*, 28 Misc. 2d 762 (N.Y. Sup. Ct. 1974), *mod.* 48 App. Div. 2d 928 (2nd Dept. 1974), and *Almond v. Best Movers, Inc.* No. 279/77 (Sup. Ct. County of Richmond, 1977), the plaintiffs were evicted from their homes and in their absence, their furniture and household possessions were removed by an agent of the defendant moving and storage company, who accompanied a marshal. In each case, the plaintiffs alleged that no warehouse receipt was issued, that there was no contractual agreement with the defendant and that there was no explanation nor notice within a reasonable time of storage fees. In spite of these disputes, the plaintiffs were threatened with sale of their stored property.[2] Moreover,

[2]See also, *Svendsen v. Smith's Moving and Trucking Co.*, (S.D.N.Y. 77 Civ. 2863, 1977), where even though the plaintiff was present when her property was removed, she still alleged that she never authorized the defendant to remove or store her property and that she was not advised of the rate of storage until she received a bill two months later. The warehouseman not only threatened to sell the property but eventually sold the goods.

in *Almond* the defendant did not even know that the plaintiff owned the property when the plaintiff tried to get her property back.

Furthermore, in *Knox v. DeCarolis Moving and Carting Co., supra,* before agreeing to any charges for storage, one of the plaintiffs inspected the stored property and discovered that the property was damaged and some pieces of furniture missing. Only after the commencement of a lawsuit and the issuance of a preliminary injunction was the dispute settled.

In another case, *Magro v. Lentini Bros. Moving and Storage Co.*, 338 F. Supp. 464 (S.D.N.Y.), *aff'd*, 410F. 2d 1064 (2nd Cir. 1971), *cert. denied*, 406 U.S. 91 (1972), the plaintiff alleged that the defendant fraudulently induced the plaintiff to sign a blank storage contract while plaintiff was under duress and charged plaintiffs false and fraudulent rates for services rendered. It was undisputed that a copy of the contract signed by plaintiff setting forth the terms for moving and storage was not sent until over two months after the goods had been stored.

Finally, the facts in the instant case further illustrate warehousemen's abuses. At the time of eviction, the marshal told plaintiff Brooks that the defendant-warehouseman accompanying him would store her property even though plaintiff Brooks wanted to call someone else. The defendant-warehouseman told plaintiff that the storage would cost $65 per month, and only after gaining possession of the property did he disclose a number of hidden charges. A series of disputes over charges subsequently took place, resulting in the warehouseman serving on the plaintiff Brooks a "final notice" to either pay the vigorously contested storage charges or have the property sold at public auction.

Furthermore, plaintiff Jones in this case denies ever authorizing the defendant-warehouseman who accompanied the marshal to store her goods and claims she was never advised of the storage rates.

The serious disputes and complicated situations described

above would be minimized if not altogether avoided if the statutory sale procedures complied with basic principles of due process by providing an opportunity for a hearing. Because warehousemen have the legal authority to unilaterally decide the amounts owed for storage and to sell the property to satisfy these debts, warehousemen have little incentive to keep complete records, to properly store the property, or to try to clarify the obligations of the owner of the property. The requirement that the owner be given an opportunity for a hearing will provide an incentive for warehousemen to conduct their businesses in a more equitable and orderly fashion.

III. AFFIRMING THE COURT OF APPEALS STATE ACTION HOLDING WILL ACCOMMODATE BOTH THE INTERESTS OF OWNERS AND WAREHOUSEMEN WHILE A REVERSAL WILL LEAVE OWNERS UNPROTECTED FROM WAREHOUSEMEN'S ABUSES

A. *A constitutional prohibition barring warehousemen from selling stored consumer goods without an opportunity for a hearing would not leave New York warehousemen remediless.*

New York law provides warehousemen with several alternative procedures to protect their interests. First, pursuant to Section 7-209 of the U.C.C., a warehouseman is entitled to a possessory lien. The existence of this lien in combination with the owner's obvious interest in obtaining the return of his personal belongings and household furniture gives a warehouseman enormous leverage in collecting his debt. R. Brown, The Law of Personal Property pp. 588-589

(3rd ed. 1975). Secondly, even if the owner-debtor refuses, objects, or is unable to pay the warehouseman, the warehouseman can sue the consumer and enforce a judgment by levying upon the retained property. Moreover, in the majority of cases, the warehouseman would be able to accelerate the proceedings.[3] For example, collection attorneys efficiently collect debts through the use of default judgments and enforcement proceedings. See e.g., D. Caplovitz, Consumers in Trouble: A Study of Debtors in Default, p. 221 (1974) (Over 90% of collection actions end in default judgments).

Finally, if the warehouseman and owner want to expeditiously resolve their dispute, New York law provides several additional avenues specifically designed to promote speedy and informal proceedings, including Arbitration or Simplified Procedure For Court Determination.[4] While Arbitration and Simplified Procedure for Court Determination are generally utilized in a commercial or labor setting, there is no prohibition on their use in the instant context. See, H. Wachtell, New York Practice under the CPLR, pp. 475-476 (5th ed. 1976)

In addition to existing remedies, recent New York State legislative history demonstrates that the Legislature responds rapidly to create new summary proceedings whenever courts have raised serious questions concerning the validity of statutory creditor remedies. In *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643, (S.D.N.Y. 1975), *vacated, sub nom. Carey v. Sugar*, 425 U.S. 73 (1976), a three-judge Federal District Court declared the New York pre-judgment attach-

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[3]"For we deal here only with the right to an opportunity to be heard...And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it." *Hernandez v. European Auto Collision*, 487 F. 2d 378, 386 (2nd Cir. 1973) (Timbers, J) (concurring), quoting from *Fuentes v. Shevin*, 407 U.S. 67 at 92-92 n. 29. See, N.Y. CPLR §3215 — Default Judgments, N.Y. CPLR §3212 — Summary Judgments, and N.Y. Lien §207 — Warrant to Sieze Chattels.

[4]Article 75, N.Y. CPLR authorizes arbitration upon agreement of the parties. N.Y. CPLR §§3031-3037, authorize simplified court procedures to promote a hearing that is as simple and informal as circumstances will permit. H. Wachtell, *supra*, at 489; N.Y. CPLR 3035(a). Also see, N.Y. CPLR §§3218 — Judgment by Confession; N.Y. CPLR §3222 — Action on Submitted Facts.

ment statute unconstitutional because it failed to grant the defendant-debtor an immediate post-seizure hearing. On March 24, 1976, this Court vacated that decision and remanded the case with directions that the three-judge District Court abstain from a decision of the federal constitutional issues until the parties had an opportunity to obtain a construction of the New York law from the New York State courts. On March 1, 1977, based on the *Sugar* decisions, the New York State Office of Court Administration and the New York State Judicial Conference recommended amendment of the New York attachment statute "to assure the constitutionality and effectiveness of New York State's attachment procedures." Memoranda, Office of Court Administration, McKinney's Session Law News, Vol. 8(a), p. A-478, Sept. 1977. Both Houses of the Legislature passed the amendments which became law on August 11, 1977. McKinney's Session Laws of New York (L. 1977, Ch. 860).

More recently in response to a three-judge District Court ruling in *Vail v. Quinlan,* 406 F. Supp. 951 (S.D.N.Y. 1976), *vacated, sub nom. Judice v. Vail,* 97 S. Ct. 1211 (1977), that the New York contempt statutes were unconstitutional when applied against judgment debtors, the New York Legislature again responded rapidly to protect the needs of creditors. On January 7, 1976, the District Court rendered its decision. On February 24, 1976, a bill (New York State Assembly Bill 10139) to cure the constitutional deficiencies in the contempt statutes was introduced in the New York Assembly. On June 29, 1976, the proposed legislation passed both Houses of the New York State Legislature. However, the bill was recalled from the Governor, after this Court noted probable jurisdiction. Subsequent to this Court's abstention holding, the Legislature, as it had after *Sugar,* promptly amended the New York contempt statutes to comply with the holding of the District Court.[5] McKinney's Session Laws of New York (L. 1977, Ch. 437).

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[5]The New York State Legislature also amended the statutory creditor remedy for seizure of a chattel after the decision in *La Prease v. Raymond Furniture Co.,* 315 F. Supp. 716 (N.D.N.Y. 1970), which declared New York State's replevin statute unconstitutional.

Therefore, if this Court were to rule that foreclosure of the warehousemen's lien constitutes unconstitutional state action, the New York legislature would quickly enact a new summary process to protect the interests of warehousemen in the event that the remaining procedures are deemed inadequate.[6]

Furthermore, the interests of property owners would be protected by an affirmation of the state action decision and the constitutional requirement of an opportunity for a hearing. Owners would be able to obtain an impartial determination of the amount owed before being permanently deprived of his property. As the Court of Appeals emphasized:

> These cases [*Sniadach, Fuentes, Mitchell* and *Di-Chem*] stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. *Brooks v. Flagg Bros., supra,* at 771.

B. *A reversal of the Court of Appeals State Action holding would insulate a large range of creditor remedies from constitutional scrutiny and leave consumers without any effective remedies to protect their stored property.*

In a series of landmark cases,[7] this Court, by application of the due process clause of the Fourteenth Amendment, has accommodated and balanced the interests of creditors and debtors. It has done so by insisting that state authorized creditor remedies meet certain specified minimum requirements of notice and opportunity to be heard before property of debtors can be transformed into property of creditors. *Parks v.*

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[6]One potential solution would be for the Legislature to declare the sale of stored goods by warehousemen to be the subject of a special proceeding as was done in the area of wage assignments. N.Y. Personal Property Law §46(e). Special Proceedings are specifically designed to assure a speedy determination of issues. H. Wachtell, *supra,* at 459-462; N.Y. CPLR, Article III.

[7]*Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), *Fuentes v. Shevin,* 407 U.S. 67 (1972), *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974), *North Georgia Finishing v. Di-Chem. Inc.,* 419 U.S. 601 (1975).

Mr. Ford, supra, at 149 (Gibbons, J) (concurring).

Respondents seek to avoid the minimum standards of due process recognized by this Court by denying state action. If no state action is involved when a warehouseman unilaterally determines the validity of an alleged obligation and forecloses on the owner's property, then a property owner would not be constitutionally entitled to notice or an opportunity to be heard. Consequently, a state legislature would have full latitude to eliminate even existing statutory protections, such as notice prior to the sale of stored property. In other words, the consequences of a no-state action holding by this Court would be to insulate a large range of creditor remedies from constitutional scrutiny. State legislatures, reputed for their responsiveness to special interests,[8] would be allowed to enact any summary procedures for lien enforcement they deem to be in the public interest without constitutional restraint.[9] *Parks v. Mr. Ford, supra,* at 149-150.

Furthermore, a reversal of the Court of Appeals will leave owners of stored property without an effective remedy to protect their property. The Attorney General relying on *Dininny v. Reavis,* 100 Misc. 316 (Sup. Ct. NY Co. 1915), *aff'd.* 178 App. Div. 922 (1st Dept. 1917), argues that the owner of property held by a warehouseman has "many remedies" to protect his property, such as instituting a suit for conversion, or for an injunction, or by bringing a proceeding to recover a chattel (N.Y. CPLR Article 71)[10] (Brief for Attorney General

[8]Warehousemen and other possessory lien holders constitute a special interest to which state legislatures are traditionally responsive. R. Brown, The Law of Personal Property, §13.1 p. 391. See generally Kroft, the Magic and Myth of the Big Lobbyists; Empire State Report Vol. 1, No. 8 pp. 116-127 (April, 1975).

[9]At least since the *Civil Rights Cases* 100U.S. 3(1883), this Court has stressed the importance of the Fourteenth Amendment as a protection against unconstitutional state legislation. *Id.* at 11, 13, 17 and 18. A no-state action holding will, in effect, authorize state legislatures to circumvent the constitutional protections for debtors established by this Court in the *Sniadach* line of cases. See, *Parks v. Mr. Ford, supra,* at 150 (Gibbons, J) (concurring).

[10]The Attorney General also relies on *Phillips v. Money,* 503 F. 2d 990, 994-995 (7th Cir. 1974), *cert. denied,* 420 U.S. 934. *Phillips,* in contrast to the instant case, dealth with a creditors possession rather than sale of a debtor's property. A sale of property is a final rather than a temporary deprivation of property, and accordingly subject to greater constitutional protection. See, *Hernandez v. European Auto Collision, supra,* at 385.

at 18-19). However, as Judge Timbers has recognized in the analagous context of garagemens' liens:

> The fact that the owner may institute a suit for damages or other appropriate relief does not, in the uneven situation normally included in enforcement of a lien, satisfy the requirements of due process. *Hernandez v. European Auto Collision, Inc., supra,* at 385.

See also, *Parks v. Mr. Ford, supra,* at 166. (Seitz, C.J., concurring in part and dissenting in part, stated: "The debtor-creditor world is turned upside down when the debtor cannot regain his property without . . . filing suit . . .")

A party seeking to deprive an owner of his personal property must generally insitute an action, obtain a judgment and proceed to execution. These procedures afford a property owner an opportunity for a hearing. The remedies proferred by the Attorney General, however, reverse this normal burden of instituting proceedings, as well as the burden of proof. Moreover, these remedies do not afford the property owner a realistic opportunity for a hearing before his property is sold.

A sale may occur as quickly as twenty-four days after the warehouseman serves the notice of sale, NY U.C.C. §7-210, and it is unlikely that a plenary action for conversion, an injunction, or an action to recover a chattel could be instituted and temporary relief obtained prior to sale. *Caesar v. Kiser,* 387 F. Supp. 645, 649 (M.D N.C. 1975). Moreover, "[a] preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing." *Margolies v. Encounter,* 42 N.Y. 2d 475, 479 (1977). Temporary restraining orders and preliminary injunctions "are in the nature of extraordinary remedies and consequently do not provide the assurance that a hearing will be held before the permanent deprivation of property occurs." *Caesar v. Kiser, supra,* at 649. In addition, the posting of a bond is a prerequisite to obtaining either a preliminary injunction, N.Y. CPLR §6312; *Margolies v. Encounter, supra,* or an order of seizure, N.Y. CPLR §7102(b).

Moreover, in contrast to a commercial setting where a warehouseman and a merchant have contracted for the warehouseman's services in an arms-length negotiation,

respondents in the instant case are "uneducated, uninformed consumer[s] with little access to legal help and unfamiliar with legal procedures . . ."[11] *Hernandez v. European Auto Collision, supra,* at 381 n.1. (concurring opinion), quoting from *Fuentes v. Shevin, supra,* at 83 n. 13. In addition, there is no contract between respondents and Flagg Bros. upon which respondents might sue and recover. The remote possibility that an owner of personal property may bring a plenary action no more provides an adequate opportunity for a hearing in this case then in *Sniadach, Fuentes, Mitchell,* or *Di-Chem.*

IV. THE WAREHOUSEMAN'S STATUTORY AUTHORITY TO FORECLOSE ON A WAREHOUSEMAN'S LIEN CONSTITUTES STATE ACTION

The Court of Appeals, in this case set the framework for finding state action by stating that:

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan*

[11]A Special Committee of the American Bar Association has documented the lack of access to legal services of the overwhelming majority of Americans. The Committee estimates that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people. ABA Special Committee on Prepaid Legal Services, a primer of Legal Services (1974). Other responsible authorities suggest that the figure is substantially higher. See e.g., Tunney and Frank, "Federal Roles in Lawyer Reform." 27 Stan. L. Rev. 333, 343 and n. 36 (1975). Therefore, it ignores reality to argue that an owner of property has a theoretical right to initiate an action to recover his property. See also, *Bates v. State Bar of Arizona,* 97 S. Ct. 2691, 2705 (1977).

> *Edison Co.,* 419 U.S. 345, 351, (1974). *Brooks v. Flagg Bros., Inc.* 553 F. 2d 764, 769 (1977).

The respondent's brief carefully sifted through the facts and circumstances of this case to reveal that U.C.C. §7-210 delegates to warehousemen the traditional governmental functions of lien enforcement binding non-consensual dispute resolution and summary sales which without this specific legislative authorization, would be unlawful.

The New York State Consumer Protection Board agrees with and relies upon the respondent's analysis to demonstrate that the enforcement of the warehouseman's lien constitutes state action and concurs with the Court of Appeals in that:

> [t]he combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action. *Brooks v. Flagg Bros., supra,* at p. 771.

V. CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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